No. 92-757

IN THE

Supreme Court of the United States

October Term, 1992

BARBARA LANDGRAF,

Petitioner,

vs.

USI FILM PRODUCTS,
BONAR PACKAGING, INC., AND
QUANTUM CHEMICAL CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 30, 1993.

QUESTION PRESENTED

I. Does the Civil Rights Act of 1991 apply to cases pending when the Act became law so as to entitle petitioner to the full redress provided in section 102 of the Act, where the District Court found and the Court of Appeals for the Fifth Circuit affirmed, that she was the victim of sexual harassment in violation of Title VII, but was not entitled to any relief whatsoever?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Barbara Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993). (Joint Appendix ("J.A.") 19) The United States District Court for the Eastern District of Texas issued Findings of Fact and Conclusions of Law on May 20, 1991. (J.A. 9) Those Findings and Conclusions are unreported. The district court's judgment was entered on May 22, 1991. (J.A. 14)

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992.

Petitioner filed a petition for writ of certiorari on October 28, 1992. This Court granted certiorari on February 22, 1993. On March 23, 1993, the Office of the Clerk of the Supreme Court of the United States granted an extension of time within which to file a brief on the merits to and including April 30, 1993.

The jurisdiction of this Court rests upon 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

This case involves the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). (Appendix B, attached hereto.) The specific provision at issue in this case is section 102 of the Act.

STATEMENT OF THE CASE

Barbara Landgraf was employed by USI Film Products ("USI")[1] from September 4, 1984, through January 17, 1986. During that period, she was subjected to sexual harassment consisting of continuous and repeated inappropriate verbal comments and physical contact by a fellow employee, John Williams. Several times, Ms. Landgraf reported that harassment to her direct supervisor, Bobby Martin, but to no avail. Martin took no action to stop the harassment. Ms. Landgraf eventually reported the harassment to Sam Forsgard, supervisor of personnel matters. Forsgard conducted an investigation that entailed interviewing numerous female employees of USI. Those women

[1] USI Film Products, which is not a legal entity, is the plant where Barbara Landgraf worked. USI was owned by Quantum Chemical Corporation while Barbara Landgraf worked there. It is now owned by Bonar Packaging, Inc. Prior to trial the parties stipulated that Bonar Packaging, Inc. was the corporate successor in interest.

corroborated Ms. Landgraf's allegations. As a result of that investigation, USI purportedly transferred Williams to another department in the plant; Williams also received a written reprimand. USI conceded, however, that Williams was still in Ms. Landgraf's work area on a regular basis. (J.A. 21) Shortly after Williams was "transferred", Ms. Landgraf resigned from her position at USI.

Ms. Landgraf filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In due course, the EEOC issued a Notice of Right to Sue.

On July 21, 1989, Ms. Landgraf commenced a timely action against USI in the United States District Court for the Eastern District of Texas alleging, among other things, sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* A bench trial was held on February 4, 1991. On May 22, 1991, the district court entered Findings of Fact and Conclusions of Law. The district court found, inter alia, that:

- Ms. Landgraf had been subjected to continuous sexual harassment consisting of "continuous and repeated inappropriate verbal comments and physical contact" from John Williams;

- Ms. Landgraf's direct supervisor, Bobby Martin, had taken no action to halt the harassment, even though Ms. Landgraf reported the harassment on several occasions;

- The remedial actions that were eventually instituted after Sam Forsgard's investigation alleviated the harassment;

- Ms. Landgraf resigned because she had difficulty getting along with her co-workers, and that situation was unrelated to sexual harassment; and

- Ms. Landgraf "suffered mental anguish as a result of the sexual harassment she was subjected to while working at USI".

(J.A. 9-10)

In light of the above, the district court concluded, inter alia, that:

- Ms. Landgraf was the victim of unlawful sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*;

- Ms. Landgraf's complaints to Martin constituted actual notice of the harassment;

- Martin's repeated failure to take action constituted failure on the part of USI to take prompt remedial action to halt the sexual harassment;

- Ms. Landgraf was not constructively discharged within the meaning of *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65 (5th Cir. 1980); and

- Ms. Landgraf was entitled to no relief whatsoever.

(J.A. 10-12)

The district court's judgment was entered on May 22, 1991. (J.A. 14) Barbara Landgraf timely appealed from that judgment, asserting that the district court erred in finding that USI had taken steps reasonably calculated to end the harassment, and in finding that she had not been constructively discharged. Ms. Landgraf also asserted that the district court erred in failing to make findings of fact and conclusions of law relating to her retaliation claim. In addition, she argued that even if she failed to prove constructive discharge, she was still entitled to nominal damages and equitable relief. Finally, Ms. Landgraf asserted that the compensatory and punitive damages and the jury trial provisions of the Civil Rights Act of 1991 (the "Act") were applicable to her case.[2]

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[2] The Civil Rights Act of 1991 was signed into law on November 21, 1991, while Ms. Landgraf's appeal was pending. By letter dated February 6, 1992, pursuant to Rule 28(j) of the Rules of the Appellate Procedure, counsel for petitioner requested the clerk of the court to bring the potential applicability of the Act to petitioner's case to the attention of the Court of Appeals for the Fifth Circuit. (J.A. 17)

On July 30, 1992, the Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291, affirmed the district court's ruling. (J.A. 28) Citing its limited scope of review, the court held that the district court did not clearly err in making its findings and conclusions. (J.A. 22-24) The court likewise rejected Ms. Landgraf's arguments for nominal damages and equitable relief. (J.A. 24-26)

Ms. Landgraf's argument with respect to the applicability of section 102 of the Act was also rejected. (J.A. 26-28) Referring to *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3356 (Sept. 29, 1992) (No. 92-737), in which the Fifth Circuit had held that section 101 of the Act is not applicable to pending cases, the court held that section 102 of the Act likewise is not applicable to such cases. The court determined first, that requiring respondents to retry the case before a jury would be a manifest injustice under the standards of *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), and a waste of judicial resources, and second, that applying the compensatory and punitive damages provision would be a manifest injustice because it would impose "an additional or unforeseeable obligation" on respondents. (J.A. 27-28)

Thus, the Fifth Circuit held that although Barbara Landgraf was the victim of "uncontested . . . significant sexual harassment", she was left with no remedy whatsoever, because neither the jury trial nor the compensatory and punitive damages sections of the Act could be applied to "conduct occurring before [the Act's] effective date".

SUMMARY OF THE ARGUMENT

Barbara Landgraf suffered significant sexual harassment consisting of continuous and repeated inappropriate verbal comments and physical contact at the hands of a fellow employee. Because Title VII, at the time, did not entitle victims of

intentional sexual harassment to damages, and because Ms. Landgraf was unable to prove that the sexual harassment she suffered made working conditions "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign", *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980)(quotations omitted), Ms. Landgraf received no relief whatsoever. The Civil Rights Act of 1991 was intended to remedy this very situation. Under the Act, victims of intentional sexual harassment are now entitled to damages. And, we submit, the plain language of the Act affords that remedy to plaintiffs like Barbara Landgraf whose cases were pending when the Act became law.

To afford the remedy due Ms. Landgraf, this Court need only remand the case for a retrial of the issue of damages for intentional sexual harassment. Respondent did not appeal from the finding of liability for sexual harassment, and petitioner does not seek a trial of the finding on constructive discharge. Thus, in order to decide this case, this Court need not decide whether the Act requires a retrial to a jury in every case that was tried to a judge before the effective date of the Act, but that was still pending before the date of the Act's enactment.

The plain language of the Act is conclusive. Giving effect to every word and phrase of the Act—as rules of statutory construction dictate, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)—it is clear that section 402(a) together with sections 109(c) and 402(b) establish a rule that, in general, the Act is to be applied to pending cases. Because there is no clear legislative intention to the contrary, this plain language controls. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

The statutory evolution of the Act confirms that construction. Again, we turn to the rules of statutory construction: where Congress includes limiting language in an early version of a bill and deletes that language before the enactment, it may be presumed that the limitation was not intended. *Russello v. United States*, 464 U.S. 16, 23 (1983). Language that either specifically

revived "dead" cases[3] or exempted pending cases was rejected by Congress several times in the course of the evolution of this statute.[4] Applying rules of statutory construction, we submit that Congress's repeated refusal to limit the Act to prospective application supports our reading of the plain language of the Act.

Even if the plain language did not control, application of judicial presumptions leads inexorably to the same conclusion. A court must apply the law in effect at the time of its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). Applying section 102 of the Act to pending cases does not result in any manifest injustice, and there is no statutory direction or legislative history that precludes application of section 102 of the Act to this case.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT DICTATES THAT THE ACT APPLIES TO PENDING CASES.

A. Analysis of the Question at Issue Must Begin With the Language of the Act.

The question before this Court is whether a statute—the Civil Rights Act of 1991—applies to pending cases. That is a question of statutory construction. As this Court has stated "time and again", "[t]he starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, [the statute's] language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)(quoting *Consumer*

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[3] By "dead" cases, we mean cases in which the judgment is final and the time for appeal has expired.

[4] The 1990 Civil Rights Act specifically applied to both pending cases and final judgments; it was vetoed in part for this reason. We do not contend that the 1991 Act similarly applies to final judgments. It does, however, apply to pending cases.

Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); *see Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.)("The text of the statute, and not the private intent of the legislators, is the law . . . . It is easy to announce intents and hard to enact laws; the Constitution gives force only to what is enacted.").

B. The Plain Language of the Act Dictates that the Act Applies to Pending Cases.

Three provisions of the 1991 Civil Rights Act explicitly address the Act's applicability to pending cases: sections 402(a), 109(c) and 402(b). Section 402 deals with the Act's effective date, and is the only provision in the Act that generally addresses the Act's applicability to pending cases. Section 402(a) provides that "[e]xcept as otherwise specifically provided, th[e] Act and the amendments made by the Act shall take effect upon enactment". Sections 109(c) and 402(b) both state explicit exceptions to this general rule.

In interpreting these sections, effect must be given to every clause and word in a statute, because "'[t]he cardinal principle of statutory construction is to save and not to destroy'". *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)(quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used"). This Court reiterated that rule last term: it is a "settled rule" of statutory construction "that a statute must, if possible, be construed in such a fashion that every word has some operative effect". *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *see also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)("we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law"). Statutory phrases cannot, however, be read in isolation; rather, statutes are to be read as a whole. *United*

States v. Morton, 467 U.S. 822, 828 (1984); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989).

Thus, to divine the meaning of section 402(a), we must look first to the words in the provision and then interpret those words in the context of the entire statute. The initial clause "except as otherwise provided" is a qualification to the second clause "this Act and the amendments made by this Act shall take effect upon enactment". If that qualification is to have any meaning, it must mean that there are other provisions in the statute that do not "take effect upon enactment". Two such provisions, sections 109(c) and 402(b), are found in the Act. Section 109(c) provides that "[t]he amendments made by this section [regarding American citizens working overseas] shall not apply with respect to conduct occurring before the date of the enactment of this Act".[5] The language is unequivocal; section 109 does not apply to pre-Act conduct. Section 402(b) provides that "[n]otwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983".[6] The language in 402(b) is also unequivocal; the dates in 402(b) make clear that the Act does not apply to the litigation falling within its classification. Because both of those sections explicitly provide for prospective application of the Act in certain circumstances, such prospective application is the "exception" to which the qualification in section 402(a) refers. Thus, "take effect upon enactment" must mean that the Act generally applies to pending cases. Otherwise, the qualification is meaningless. *See Estate of Reynolds v. Martin*, 985 F.2d 470, 473 (9th Cir. 1993);

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[5] Section 109 extends the civil rights laws to protect United States citizens working overseas. Because of section 109(c), however, none of these protections apply to pre-Act conduct.

[6] Because of the specificity of these dates, the effect of section 402(b) is solely to preclude the Act from applying to the Wards Cove Packing Company litigation which is still pending in the Ninth Circuit.

Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325, 327 (D.D.C. 1992) (Sporkin, J.).[7]

Sections 109(c) and 402(b), both of which are explicitly prospective, also demonstrate independently that the Act otherwise applies to pending cases. *See Estate of Reynolds*, 985 F.2d at 473; *Robinson*, 790 F. Supp. at 327. A fundamental principle of statutory construction is that "no provision [of a statute] should be construed to be entirely redundant". *Kungys v. United States*, 485 U.S. 759, 778 (1988); *see also Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (stating the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) ("[t]he statute admits a reasonable construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy"). If the entire Act is inapplicable to

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[7] Section 108 (which amends section 703 of the Civil Rights Act of 1964) contains two additional exceptions to the general rule. As amended, section 703(n)(2)(A) now provides, inter alia,

> "[n]othing in the subsection shall be construed to—
> alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure *or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened*". (emphasis added)

This provision requires that challenges to litigated or consent judgments or orders be resolved promptly and in an orderly manner, but provides that section 703(n) does not affect the rights of parties who successfully intervened prior to the Act's enactment. *See Estate of Reynolds*, 985 F.2d at 474 n.1. If the Act did not otherwise apply to pending cases, the second clause of section 703(n) would be meaningless.

Section 703(n)(2)(B), as amended, now provides, inter alia,

> "[n]othing in this subsection shall be construed to—
> apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government".

This section also precludes application of section 703(n) of the Act to certain pending cases. If the Act did not otherwise apply to pending cases, this section would be meaningless.

pending cases, sections 109(c) and 402(b) are "entirely redundant". *See Estate of Reynolds*, 985 F.2d at 474; *Robinson*, 790 F. Supp. at 327. Sections 109(c) and 402(b) thus provide compelling evidence that the Act is applicable to pending cases.

Several courts of appeal have attempted to avoid those well-established tenets of statutory construction by suggesting that sections 109(c) and 402(b) are simply "insurance policies" inserted to assure that courts could not apply those specific provisions to particular pending cases. *See Butts v. City of New York Dep't of Hous. Preservation and Dev.*, No. 92-7850, 1993 WL 85026, at *11 (2d Cir. Mar. 24, 1993)(collecting cases).[8] So-called "insurance policies" are not recognized in the rules of statutory construction, however. *See Estate of Reynolds*, 985 F.2d at 478. Not only does the analysis lack foundation in the rules of statutory construction, but the premise of the argument is completely inconsistent with those rules. When the language of a statute is clear, there is no place for speculation about Congress's intentions. *See Estate of Reynolds*, 985 F.2d at 478; *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

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[8] Even though the Second Circuit adopted the explanation that sections 109(c) and 402(b) are "insurance policies", it apparently recognized that such a reading of 109(c) and 402(b) is inconsistent with rules of statutory construction. Agreeing with the *Reynolds* court "that it is the duty of reviewing courts to give effect to every clause and word of statute where possible", *Butts*, No. 92-7850, 1993 WL 85026, at *11, the Second Circuit stated that sections 204(b) and 303(b)(4), both of which "require certain things to take place in the future" are the exceptions to which the first clause in 402(a) refers. *Id.* That is simply not so.

Section 204(b) provides that "*[n]ot later than* 15 months after the date of the enactment of this Act, the Commission shall prepare and submit . . . the findings and conclusions of the Commission". (emphasis added) Section 303(b)(4) provides that "[t]he first Director shall be appointed and begin service *within* 90 days after the date of enactment of this Act". (emphasis added). Neither of those sections provides for prospective application. Rather, they provide a time frame within which certain events must be completed. Those "events" could occur on the date of the enactment of the Act or sometime after enactment. But whenever those events occur, the provisions of the Act requiring completion of the events clearly "took effect" upon the date of enactment of the Act.

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) ("*[e]xpressio unius est exclusio alterius*")(all omissions shall be understood as exclusions).[9]

C. No Clear Legislative Intent Contradicts the Act's Plain Language.

The plain language of a statute is conclusive, except in the "'rare and exceptional circumstances'", when a contrary legislative intent is clearly expressed. *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991)(quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). Thus, a court should examine the

[9] A handful of courts have stated that the language of section 102(d) implies that the Act does not apply to pending cases. Section 102(d) defines a "complaining party" as "the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)". The argument is that the word "may" implies that the Act only applies to those who have yet to bring an action. *Van Meter v. Barr*, 778 F. Supp. 83, 85 (D.D.C. 1991); *see also Thompson v. Johnson & Johnson Management Info. Ctr.*, 783 F. Supp. 893, 895 (D.N.J. 1992), *aff'd*, No. 92-5190 (3d Cir. Mar. 19, 1993); *Joyner v. Monier Room Tile, Inc.*, 784 F. Supp. 872, 876 (S.D. Fla. 1992). That reading is forced at best. There is no difference between the present and future tense of the word "may". In this section, "may" does not indicate tense, rather, it indicates that one is allowed or permitted to do something—bring an action under Title VII. In fact, use of the word "may" "has nothing to do with pending cases, and everything to do with the standing of the parties to invoke the jurisdiction of the federal courts". *Kennedy v. Fritsch*, 796 F. Supp. 306, 310 (N.D. Ill. 1992). The permissive interpretation of the word "may" in section 102(d) is confirmed by the fact that this section amends an existing statute, Title VII. Interpreting "may bring" in the future tense—as applying only to future cases—would result in this section never becoming applicable. In addition, in the context of the statutory scheme of Title VII, it would have made no sense for Congress to have defined a "complaining party" as "a person who may bring, or who has brought" an action, because the statute will apply long after the issue of the Act's applicability to pending cases is resolved.

legislative history only to determine whether a clearly expressed legislative intention contrary to the statutory language exists. *See Bonjorno*, 494 U.S. at 835. The legislative history of the Civil Rights Act of 1991 does not expressly contradict the plain language of the statute.

The Act is the result of a compromise worked out between Senators Edward M. Kennedy and John C. Danforth, the bipartisan sponsors of the bill in the Senate. Both the Senate and the House voted on the compromise bill without returning it to a legislative committee. Thus, there are no committee or conference reports interpreting the final language of the bill. Instead, individual members of Congress introduced a series of interpretive memoranda into the Congressional Record, which conflict with one another on the applicability of the Act to pending cases.[10]

The principal sponsors of the Act, Senators Kennedy and Danforth, disagreed regarding the Act's applicability.[11] Senator Danforth's interpretive memorandum states that "the provisions of this legislation shall take effect upon enactment and shall not apply retroactively". 137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991). Senator Kennedy responded to that memorandum by

[10] *Compare* 137 Cong. Rec. S15963-64 (daily ed. Nov. 5, 1991)(statement and interpretive memorandum of Sen. Kennedy) and 137 Cong. Rec. H9530-31 (daily ed. Nov. 7, 1991) (interpretive memorandum of Rep. Edwards) stating that the Act applies to pending cases *with* 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991)(interpretive memorandum of Sen. Dole, et al.), 137 Cong. Rec. S15483 (daily ed. Oct. 30, 1991)(interpretive memorandum of Sen. Danforth) and 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991)(interpretive memorandum of Rep. Hyde) stating that the Act only applies to future cases.

[11] The statements of an Act's sponsors are generally given substantial weight in interpreting the Act. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Id.*; *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982)(remarks of the "sponsor of the language ultimately enacted . . . are an authoritative guide to the statute's construction").

stating that a restorative law—such as the Civil Rights Act of 1991—should be applied to pending cases, especially when it involves procedures and remedies.

> "It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment. Ordinarily, courts in such cases apply newly enacted procedures and remedies to pending cases. . . . And where a new rule is merely a restoration of a prior rule that had been changed by the courts, the newly restored rule is often applied retroactively, as was the case with the Civil Rights Restoration Act of 1988."

137 Cong. Rec. S15485 (daily ed. Oct. 30, 1991). The statements of the legislators on the 1991 Civil Rights Act are thus inconclusive regarding its applicability to pending cases.[12] Because there is no "clearly expressed legislative intention" contrary to the plain language, the plain language controls. *United States v. James*, 478 U.S. 597, 606 (1986); *cf. Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 n.14 (1989)("Strict adherence to the language and structure of the Act

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[12] With the exception of the Eighth Circuit, in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1378 (8th Cir. 1992), every court of appeals to consider the question has held that the legislative history is inconclusive. *See, e.g., Butts v. City of New York Dep't of Hous. Preservation and Dev.*, No. 92-7850, 1993 WL 85026, at *9 (2d Cir. Mar. 24, 1993)("We agree that the legislative history is ambiguous."); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1373 (5th Cir. 1992)("Legislative history . . . sheds little light on whether the Act should apply to pre-enactment conduct."), *petition for cert. filed*, 61 U.S.L.W. 3356 (Sept. 29, 1992)(No. 92-737); *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.)("The legislative history does not provide any guidance on this question [of retroactivity]."), *cert. denied*, 113 S. Ct. 86 (1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir. 1992)("The floor debates on the 1991 act reveal . . . divergent views on these questions [concerning retroactivity]. . . . [T]he contenders could not agree, so they dumped the question into the judiciary's lap without guidance."), *petition for cert. filed*, 61 U.S.L.W. 3446 (Dec. 3, 1992)(No. 92-977); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 934 (7th Cir.)("A clear indication of congressional intent cannot be deciphered from the legislative history . . . ."), *cert. denied*, 113 S. Ct. 207 (1992).

is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises."). Accordingly, this Court should adhere to the plain language and find that the Act, including section 102, applies to pending cases.

II. THE STATUTORY EVOLUTION OF THE ACT SUPPORTS APPLICATION OF THE ACT TO PENDING CASES.

The statutory evolution of the Act provides further support for our reading of the plain language of the Act. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983). Ignoring critical events in the statutory evolution of the Act, the Eighth Circuit held that the enactment history of the Act was "dispositive" of a Congressional intent not to apply the Act to pending cases. *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1378 (8th Cir. 1992). That analysis is flawed. The Eighth Circuit overlooked certain critical events in its analysis of the evolution of the Act. *See Butts v. City of New York Dep't of Hous. Preservation & Dev.*, No. 92-7850, 1993 WL 85026, at *8 (2d Cir. Mar. 24, 1993) (*Fray*'s analysis "is undermined by complicating facts"); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 933-34 (7th Cir.)(same), *cert. denied*, 113 S. Ct. 207 (1992). Indeed, analysis of the statutory evolution of the provisions addressing the Act's applicability to pending cases supports application of the Act to pending cases.[13] *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431-37 (1968)(tracing enactment history of Civil Rights Act of 1866).

In holding the 1991 Civil Rights Act inapplicable to pending cases, the Eighth Circuit in *Fray* focused on President Bush's

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[13] Here we draw a distinction between the statements of individual legislators and the actions of Congress as a whole. No Congressional intent can be divined from tallying up the statements in floor debates made by individual legislators or even by the two sponsors of this legislation. *See Butts*, No. 92-7850, 1993 WL 85026, at *7. The actions that Congress took as a whole in passing the Act, however, are illustrative. In interpreting legislation, courts should look at the actions of Congress as a whole, not the actions of individual legislators. *See United States v. Public Utils. Comm'n of Cal.*, 345 U.S. 295, 319 (1953)(Jackson, J., concurring).

veto of the 1990 Civil Rights Act. The 1990 Act specifically applied to both pending cases and final judgments, and was thus "purely retroactive".[14] Because the 1990 Act, with its clear retroactivity language, was vetoed, the Eighth Circuit held that the 1991 Act, absent such language, is not retroactive. The court, however, did not focus on the fact that the 1990 Act provided that final judgments could be vacated; in fact, it was vetoed in part for that reason. The 1991 Act, by contrast, does not provide for vacating final judgments. The *Fray* court also ignored the fact that Congress rejected language, proposed by the President, that specifically exempted pending claims from the reach of the 1991 Act. *See* 137 Cong. Rec. H3898 (daily ed. June 4, 1991). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. at 23-24 (citing *Arizona v. California*, 373 U.S. 546, 580-81 (1963)). Congress's action in removing that limiting language supports application of the Act to pending cases.

A. The Civil Rights Act of 1990.

The language and intended reach of the Civil Rights Act of 1991 can perhaps be more clearly understood against the backdrop of the failed Civil Rights Act of 1990. The 1990 Act expressly provided for pure retroactive application. Like the current Act, the 1990 Civil Rights Act would have overruled several Supreme Court decisions. Each provision of the 1990 Act

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[14] Much confusion has resulted from the indiscriminate use of the word "retroactive". This Court has defined a retroactive or retrospective law as a "statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability". *Sturges v. Carter*, 114 U.S. 511, 519 (1885). Application of a new law to a pending case is not "retroactive", unless the application impairs vested rights. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 864-65 (1990)(White, J., dissenting)(true retroactivity involves "the application of a change in law to overturn a judicial adjudication of rights that has already become final"). Thus, technical, or pure, retroactivity refers only to applying new laws which impair vested rights—such as vacating final judgments by reviving dead cases.

overruling a Court decision was made expressly applicable on the date of the Supreme Court decision overruled by that provision.[15] Thus, the 1990 Act explicitly applied to pending cases. But the 1990 Act went much further and was also purely retroactive in the sense that it set forth "transition rules" that allowed final

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[15] The 1990 Civil Rights Act provided that:

> "(1) Section 4 [restoring the burden of proof in disparate impact cases] shall apply to all proceedings pending on or commenced after June 5, 1989 [the date of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)];
>
> (2) Section 5 [clarifying prohibition against impermissible consideration of race, color, religion, sex, or national origin in employment practices] shall apply to all proceedings pending on or commenced after May 1, 1989 [the date of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)];
>
> (3) Section 6 [facilitating prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments or orders] shall apply to all proceedings pending on or commenced after June 12, 1989 [the date of *Martin v. Wilks*, 490 U.S. 755 (1989)];
>
> (4) Section 7(a)(1), 7(a)(3) and 7(a)(4), 7(b) [statutes of limitations], 8 [damages], 9 [attorney's fees], 10 [actions against federal government], and 11 [rules of construction] shall apply to all proceedings pending on or commenced after the date of enactment of this Act;
>
> (5) Section 7(a)(2) [statute of limitations] shall apply to all proceedings pending on or commenced after June 12, 1989 [the date of *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989)]; and
>
> (6) Section 12 [restoring prohibition against all racial discrimination in the making and enforcement of contracts] shall apply to all proceedings pending on or commenced after June 15, 1989 [the date of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)]."

S. 2104, 101st Cong., 2d Sess. § 15(a)(1990)(Senate version of the 1990 Civil Rights Act).

judgments and orders in "dead" cases to be vacated "if justice require[d]".[16] Specifically, the 1990 Act provided that

> "any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested, where the time for seeking further judicial review of such judgment has otherwise expired . . . shall be vacated in whole or in part if justice requires . . . ."

S. 2104, 101st Cong., 2d Sess. § 15(b)(3)(1990). In contrast, the Bush Administration attempted to make the Act purely prospective, proposing an amendment to the 1990 Act explicitly exempting pending cases by replacing the application dates and transition rules with the following language:

> "This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act. . . . The Amendments made by this Act shall not apply with respect to claims arising before the date of enactment of this Act."

136 Cong. Rec. H6747 (daily ed. Aug. 3, 1990)(Michel-LaFalce amendment). That proposal was defeated by a vote of 238 to 188. 136 Cong. Rec. H6768 (daily ed. Aug. 3, 1990)(Michel-LaFalce amendment rejected).

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[16] The Joint Conference Report states that the provision was necessary for the following reason:

> "The Supreme Court decisions overturned by this bill repudiated well-settled case law which protected American workers against employment discrimination. In the past year, hundreds of discrimination victims have had their claims dismissed, or their rights and remedies otherwise impaired, as a direct result of the application of these decisions. Both the Senate Bill and the House Amendment provide for the application of this legislation to claims which are pending (or as to which the time for appeal has not yet run) on the date of enactment. Nevertheless, other claims may have been resolved by the entry of a final judgment as to which the time for appeal has run prior to the date of enactment. This latter group of claims may only be revived by a mechanism such as that provided by [this provision]."

136 Cong. Rec. H8049 (daily ed. Sept. 26, 1990)(joint explanatory statement of the Conference Committee).

On October 22, 1990, President Bush vetoed the 1990 Civil Rights Act, and Congress failed to override the veto. President Bush's veto message listed the Act's "unfair retroactivity rules" as one of the reasons for his veto. *See* 136 Cong. Rec. S16418-19 (daily ed. Oct. 22, 1990)(veto message of President Bush).[17] Congress immediately began drafting a new civil rights act.

B. The Civil Rights Act of 1991.

The original version of the 1991 Act contained the same application scheme as the vetoed 1990 Act; it permitted vacating final judgments and reviving dead cases. The Administration proposed amendments in the Senate and the House, both of which exempted pending claims from the Act. The Administration proposals consisted of two sentences:

> "This Act and the amendments made by this Act shall take effect upon enactment. *The Amendments made by this Act shall not apply to any claim arising before the effective date of this Act.*" (emphasis added)

137 Cong. Rec. S3023 (daily ed. Mar. 12, 1991)(Senator Dole's introduction of S. 611); 137 Cong. Rec. H3898 (daily ed. June 4, 1991)(Michel substitute to H.R. 1). The Senate version garnered only eight co-sponsors and was never put up for a vote; the House version was defeated. Thus, Congress again rejected the Administration's proposals for purely prospective application. *See* 137 Cong. Rec. H3908-09 (daily ed. June 4, 1991).

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[17] In his veto message, President Bush referred to Attorney General Thornburgh's memorandum, and stated that it explained more fully the reasons for his veto. 26 Weekly Comp. Pres. Doc. 1632 (Oct. 22, 1990). Attorney General Thornburgh's memorandum objected to the 1990 Act's application to final judgments, not pending cases:

> "Several other provisions of this bill have little to do with promoting civil rights. Rather, they seem principally designed to give plaintiffs special and unwarranted litigation advantages. . . . Section 15 unfairly applies the changes in the law made by S. 2104 to cases already decided."

Attorney General Thornburgh's Memorandum for the President (Oct. 22, 1990). (Appendix A, attached hereto, at A-13)

During the debate over the 1991 Act, Senators Kennedy and Danforth drafted a compromise bill. The bill replaced the proposed language on the applicability of the 1990 Act with the first sentence of the Administration's proposal. The second sentence, making the Act explicitly prospective, was deleted. Thus, the drafters of the 1991 Civil Rights Act could not be said to have intended to limit the Act only to future claims, while excluding pending claims. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983). On the contrary, Congress's action in deleting the limiting language supports application of the Act to pending cases.

In sum, the plain language of the 1991 Civil Rights Act mandates its application to pending cases. To give effect to every clause and every section, the Act must generally apply to pending cases, except as otherwise specifically provided. No other reading of the Act makes sense. Moreover, no clear legislative intent contradicts the Act's plain language. Indeed, the statutory evolution of the Act provides further evidence that Congress clearly understood, partisan rhetoric aside, that the Act would apply to pending cases.[18]

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[18] The controversy surrounding section 402(b), which provides that the Act does not apply to the litigation involving the Wards Cove Packing Company, supports our reading of the plain language of the Act. When the 1991 Civil Rights Act first passed the Senate on October 30, 1991, section 402(b) was inadvertently omitted. The bill was returned to the floor for a separate vote. The return of the bill generated an intense debate over the propriety of exempting one specific company from legal standards that would be applicable to all other persons if the Act applied to pending cases. This action would only be necessary, of course, if the Act otherwise applied to pending cases. Similar opposition to the exemption of the Wards Cove Packing Company occurred when the compromise bill, containing section 402(b), was brought to the floor of the House. Congress and the President ultimately agreed to include section 402(b) in the 1991 Act.

It is hard to imagine that there would have been such a controversy over the "Wards Cove" provision, and such an insistence that section 402(b) be included, had Congress understood that the 1991 Act did not apply to pending cases. Had the Act been so limited, an exemption for the Wards Cove Packing Company would obviously have been unnecessary.

III. APPLICATION OF JUDICIAL PRESUMPTIONS RESULTS IN THE SAME CONCLUSION.

Courts should turn to judicial presumptions to interpret statutes only when the plain language of the statute at issue is inconclusive. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Here, as we have argued, the plain language of the statute provides that the Act appliés to pending cases, and there is no clear congressional intent to the contrary. Thus, the inquiry should begin and end with the language of the Act. However, even if the language were ambiguous—and we submit it is not—rules of judicial presumptions lead to the same result as under the plain language analysis: the Act applies to pending cases.[19]

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[19] Many of the lower courts that have addressed the issue of the Act's applicability to pending cases have barely acknowledged or have ignored the statutory language, and relied instead on judicial presumptions. *See Butts v. City of New York Dep't of Hous. Preservation and Dev.*, No. 92-7850, 1993 WL 85026, at * 12-15 (2d Cir. Mar. 24, 1993)(relying on judicial presumptions to hold that the act does not apply to pending cases except those that were pending on appeal when the Act was passed); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1373-75 (11th Cir. 1992)(refusing to apply the Act to pending cases because of judicial presumptions); *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 892-900 (D.C. Cir. 1992) (same), *petition for cert. filed*, 61 U.S.L.W. 3523 (Jan. 13, 1993)(No. 92-1190); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1373-74 (5th Cir. 1992)(same), *petition for cert. filed*, 61 U.S.L.W. 3356 (Sept. 29, 1992)(No. 92-737); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 934-40 (7th Cir.)(same), *cert. denied*, 113 S. Ct. 207 (1992).

The Sixth Circuit in *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992), also refused to apply the Act to pending cases, but the court relied primarily on an EEOC policy statement issued December 27, 1991, that declined to seek damages for pre-Act conduct. *See* EEOC Notice No. 915,002, *reprinted in* EEOC Compl. Manual (CCH) at ¶ 2096. Reliance on that policy guidance is misplaced for at least two reasons.

First, the December 27, 1991, policy statement has since been rejected by a majority of the EEOC Commission. 1993 Daily Labor Rep. (BNA) No. 59, at AA-1 (Mar. 30, 1993). Chairman Kemp subsequently challenged the propriety of that rejection on the grounds that the Commission had not followed the proper procedures. The Commission then considered the issue again, this time following the procedure for notice and comment, and affirmed its rejection of the policy

A. The Standard for Applying New Statutes to Pending Cases is Found in *Bradley v. School Board of Richmond.*

The general standard for determining when a new statute should be applied to pending cases is set forth in this Court's unanimous decision in *Bradley v. School Board of Richmond*: "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary". 416 U.S. 696, 711-15 (1974)(citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801); *Thorpe v. Housing Auth.*, 393 U.S. 268, 281-82 (1969)). In explaining the manifest injustice exception, the *Bradley* Court stated that "[t]he concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights". *Bradley*, 416 U.S. at 717.

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statement. 1993 Daily Labor Rep. (BNA) No. 71, at A-1 (Apr. 15, 1993).

Second, while an administrative interpretation of a statute by the agency that administers it should generally be given deference, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), this Court has not hesitated to reject EEOC interpretations in the past. *See EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1235 (1991)(rejecting EEOC's interpretations of Title VII because agency was not charged with administering the statute); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)(same). The EEOC policy statement here should not be given deference, because the EEOC has no rulemaking responsibility regarding application of the 1991 Civil Rights Act to pending cases. *See General Elec.*, 429 U.S. at 141. Further the policy statement is not persuasive, because it rests largely on the EEOC's reading of Supreme Court precedents, not on its administrative expertise. *See Carpenter v. Ford Motor Co.*, No. 90-C-5822, 1992 WL 80061, at *4 (N.D. Ill. Apr. 10, 1992); *cf. General Elec.*, 429 U.S. at 141-42 (an agency's rules or regulations promulgated according to statutory authority are accorded the most weight).

The origin and justification for the *Bradley* rule of application are found in the words of Chief Justice Marshall in *Schooner Peggy*:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation."

5 U.S. (1 Cranch) at 110.

The *Schooner Peggy* Court cautioned that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, *affect the rights of parties*". *Id.* (emphasis added). From *Schooner Peggy*, the Court developed the rule that a new statute generally applies to cases pending at the time of its passage, but should not be construed retroactively to alter vested rights. The Court "uniformly refuse[d] to give to statutes a retrospective operation, whereby rights previously vested [were] injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature . . . 'or unless the intention of the legislature [could not] otherwise be satisfied'". *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (quoting *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413, 2 L. Ed. 479 (1806)).

In *Thorpe v. Housing Authority*, 393 U.S. 268, 272, 283 (1969), this Court held that even though a Department of Housing and Urban Development circular did not indicate whether it was to be applied to pending cases, the circular, which required the local housing authority to inform the tenant of the reasons for eviction and give the tenant an opportunity to reply, was nonetheless to be applied to anyone residing in the housing project at issue on the date it was promulgated. In so holding, this Court relied on the general rule "that an appellate court must

apply the law in effect at the time it renders its decision". *Thorpe*, 393 U.S. at 281 (citations omitted).

This Court has repeatedly affirmed its commitment to the *Bradley* rule that a court should apply the law at the time of its decision. In *Cort v. Ash*, 422 U.S. 66 (1975), for example, this Court relied on the *Bradley* rule to apply an amendment to the Federal Election Campaign Act of 1971 to a pending action. Citing *Bradley*, this Court stated "the Amendments constitute an intervening law that relegates to the Commission's cognizance respondent's complaint . . . [O]ur duty is to decide this case according to the law existing at the time of our decision". *Id.* at 76-77.[20]

In *Bennett v. New Jersey*, 470 U.S. 632 (1985), this Court, citing *Bradley*, refused to apply an amendment to Title I of the Elementary and Secondary Education Act of 1965 to pending claims. Focusing on the *Bradley* Court's concern with vested rights and expectations of the parties, the *Bennett* Court noted that the Department of Education's "right . . . had matured or become unconditional" because grant programs are "much in the nature of a contract". *Id.* at 638, 639 (quotations omitted). Because the Court found that applying changes in the substantive requirements for federal grants would be manifestly unjust, the Court concluded that "reliance on [the *Bradley*] presumption in this context [*i.e.*, where affecting vested rights works a manifest injustice] is inappropriate". *Id.* at 638.[21]

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[20] *See also Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982)(majority opinion)(assuming statutory amendments apply to the earlier arising case); *see id.* at 90-91 n.1 (dissenting opinion)(quoting rule in *Bradley*); *Bell v. New Jersey*, 461 U.S. 773, 793 (1983)(White, J., concurring)(quoting rule in *Bradley*).

[21] The *Bennett* Court spoke in terms of "substantive" and "procedural"—refusing to apply new substantive law to pre-act conduct but allowing new procedural law to apply to pre-act conduct. Those labels are actually a proxy for a determination of whether the law at issue affects vested rights. As a practical matter, "[r]etroactive modification of remedies normally harbors much less potential for mischief than retroactive changes in the principles of liability". *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980). And, conversely, "a law that affects substantive rights of the parties, if applied retroactively, will usually also upset the reasonable expectations of the parties concerning the legal consequences of their past conduct. But not always". *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 902 (D.C. Cir. 1992) (Wald, J., dissenting), *petition for cert. filed*, 61 U.S.L.W. 3523 (Jan. 13, 1993)(No. 92-1190). Nevertheless, the focus should be on whether applying a law to a pending case upsets vested rights or expectations, not on whether the law can be pigeon-holed as substantive or procedural.

Three years after *Bennett*, this Court decided *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). The question in *Bowen* was "whether the Secretary may exercise this rulemaking authority to promulgate cost limits that are retroactive". *Id.* at 206. The rule in question would have permitted the United States to recoup fees already properly paid to the hospital under prior reimbursement standards. *See id.* at 206-07. Relying on the "statutory scheme in question," the Court held that the rule-making authority of the Secretary of Health and Human Services did not include the "authority to promulgate retroactive cost-limit rules". *Id.* at 215. But, the majority opinion also contained the following dictum: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result". *Id.* at 208.[22]

It is that dictum that caused this Court, two years later in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), to describe the *Bradley* and *Bowen* lines of authority as existing in "apparent tension". The *Bonjorno* Court did not need to reconcile that apparent tension, however—or even decide whether the tension was real—because it found the plain language of the statute at issue controlling. *Id.* at 837-38. Moreover, four

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[22] Despite this Court's broad language in *Bowen*, that case only dealt with whether an administrative agency has the power, pursuant to federal statute, to promulgate regulations that apply retroactively. The issue of retroactive application of a statute or its application to pending cases was not in the question presented and was neither briefed nor argued by the parties.

members of the Court, dissenting as to the meaning of the language of the statute being construed, insisted that *Bowen* and *Bradley* were entirely consistent.

> "The Court discerns an 'apparent tension' between the rule of *Bradley*. . . and the rule of *Bowen* . . . . The tension [between *Bradley* and *Bowen*] is more apparent than real, for the rule against retroactivity has little to do with this case. This case does not involve true retroaction, in the sense of the application of a change in law to overturn a judicial adjudication of rights that has already become final. Nor would application of [the new statutory amendment] in this case require the courts to disturb a legal relation to which the parties have committed themselves, or that they have otherwise reached, in reliance on the state of the law prior to the amendment."

494 U.S. at 864-65 (White, J., dissenting) (citations omitted).

That the tension is merely apparent has, unfortunately, not been recognized by many courts. Considerable judicial resources have been expended discussing the tension between the cases, with some courts concluding that the *Bradley* and *Bowen* decisions cannot be reconciled. *See, e.g., Butts*, No. 92-7850, 1993 WL 85026, at *12-15 (2d Cir. Mar. 24, 1993). That conclusion is incorrect. Properly understood, *Bradley* and *Bowen* are in fact consistent. Indeed, the explanation lies in this Court's reasoning in *Bennett*:

> "'The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional' [quoting and citing *Bradley*]. This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect."

Bennett, 470 U.S. at 639. Because *Bennett* involved a statute that altered standards of conduct (*i.e.*, the standards regarding how states could use grants for educationally deprived students) on which the parties would have relied, this Court held that the

statute was presumptively inapplicable to pending cases. *See id.* at 638. A holding to the contrary would have been manifestly unjust under *Bradley*.

Likewise, application of the rule at issue in *Bowen* would have been manifestly unjust within the meaning of *Bradley*. The issue in *Bowen* was whether the rulemaking authority of the Secretary of Health and Human Services included the authority to adopt a "retroactive cost-limit rule". This Court ruled that the Secretary did not have that authority. A retroactive cost-limit rule would have meant that hospitals—after relying on specific cost reimbursement procedures in providing their patients treatment—would have had to return over $2 million in reimbursement payments to the government. As such, *Bowen* presented a classic reliance problem—the hospitals provided medical services based on the reimbursement scheme then in effect.

As illustrated above, *Bradley* and *Bowen* are consistent. The circumstances under which the *Bowen* presumption applies are the circumstances under which the *Bradley* manifest injustice test would preclude application of the statute in question to pending cases. The *Bradley* presumption does not apply in circumstances under which the *Bowen* presumption applies.[23]

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[23] A number of circuit courts have recognized that *Bradley* and *Bowen* can be reconciled in this manner. In *Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987), the Ninth Circuit relied on *Bennett* to explain how the lines of *Bradley* and *Bowen* precedent could be reconciled:

> "On closer inspection, however, there is no conflict . . . . [A] statute is not 'retroactive' simply because facts from the pre-enactment period are implicated. . . . [T]he presumption against 'retroactivity' has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law."

Campbell, 809 F.2d at 571 (citations omitted); *see FDIC v. Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991)("Any tension between the two lines of precedent is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights."), *cert. denied*, 112 S. Ct. 1937 (1992); *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357-58 n.7 (1st Cir. 1990)("the touchstone for deciding the question of retroactivity is whether retroactive application of a

We submit that the *Bradley* presumption is consistent not only with *Bowen*, but with almost two hundred years of this Court's jurisprudence: application of a new statute to pending claims is disfavored where it would adversely affect a party's vested rights or reasonable expectations.[24] The relevant inquiry is whether

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newly announced principle would alter substantive rules of conduct and disappoint private expectations").

[24] We respectfully disagree with the view expressed by Justice Scalia in his concurrence in *Kaiser Aluminum & Chem. Co. v. Bonjorno*, 494 U.S. 827, 841 (1990)(Scalia, J., concurring). We submit that the *Bradley* presumption is supported by a long line of judicial authority. *See, e.g., Thorpe v. Housing Auth.*, 393 U.S. 268, 281 (1969)(HUD circular should be applied to pending cases because "an appellate court must apply the law in effect at the time it renders its decision"); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921)(the Clayton Act "was effective from the time of its passage, and applicable to pending suits for injunction")(citing *Schooner Peggy*); *United States v. Heinszen & Co.*, 206 U.S. 370, 387 (1907)("The bringing of suits vests in a party no right to a particular decision . . . and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered" (citations omitted)); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801) ("if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed").

The application of the presumption in *Bradley* has led to clear and predictable results. Indeed, it was not until the dictum in *Bowen* that there was any confusion. *Bowen* was a unanimous decision, as was *Bradley*. There is no citation to *Bradley* in the *Bowen* decision. *See also United States v. Security Indus. Bank*, 459 U.S. 70, 80-82 (1982) (unanimous decision not to apply new statute to pending case because it would destroy pre-existing property rights (no citation to *Bradley*)). In addition, a decision to overturn or modify *Bradley* would have enormous and unpredictable effects on various statutes throughout the United States Code. Congress often does not attempt to specify which provisions would and would not apply to pre-existing cases. Instead, Congress generally leaves that issue to the courts to be determined by the application of established legal principles. To now alter these rules in construction would cause much disruption.

Finally, continued vitality of *Bradley* is necessary because it allows more flexibility than *Bowen*'s per se rule. The flexibility of the *Bradley* rule is beneficial in a wide range of areas. *See, e.g. Demars v. First Serv. Bank for Savings*, 907 F.2d 1237, 1238-40 (1st Cir. 1990) (court cited *Bradley* in applying Financial Institutions Reform, Recovery, and Enforcement Act to pending cases); *United States v. Monsanto Co.*, 858 F.2d 160, 175-76 (4th Cir. 1988) (court

applying the Act to pending cases would affect vested rights, and, if so, whether that application results in manifest injustice. The answer in this case is no on both counts.

B. Section 102 Does Not Implicate Vested Rights.[25]

Section 102 of the Act provides that a complaining party may recover compensatory and punitive damages for unlawful intentional discrimination.[26] Where a complaining party seeks compensatory or punitive damages under section 102, either party may demand a trial by jury.

Applying the damages provision of section 102 to pending cases will not alter vested rights nor will it upset reasonable

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relied on *Bradley* for application of amendment to Comprehensive Environmental Response, Compensation, and Liability Act to pending cases), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1553-54 (11th Cir.) (court relied on *Bradley* to apply amendment to Voting Rights Act to pending cases), *cert. denied*, 469 U.S. 976 (1984). Because the Court's statement against retroactivity in *Bowen* has had no perceptible effect on the actions of Congress in drafting legislation, preservation of the *Bradley* presumption is necessary to give courts the flexibility to apply future statutes correctly.

[25] We address only section 102 here because it is the only provision specifically at issue in petitioner's case. As we argue above, the plain language of the Act dictates that, except where the Act states otherwise, the Act applies to pending cases.

[26] Section 102 provides, inter alia,

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

. . . .

(c) JURY TRIAL.—If a complaining party seeks compensatory or [p]unitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3)."

expectations.[27] In *Bradley*, this Court found that applying an amendment to the Education Amendments Act of 1972 providing for attorney's fees for prevailing parties did not impose any "additional or unforeseeable" obligations on the parties whose cases were pending at the time of enactment because (1) the amendment at issue "did not alter the [defendant's] constitutional responsibility" or change "the substantive obligation of the parties"; (2) the defendant had "engaged in a conscious course of conduct with the knowledge that, under different theories, . . . [it] could have been required to pay . . . fees"; and (3) there was "no indication that the obligation" created by the amendment "if known" would have caused the defendant in that case to alter its conduct. *Bradley*, 416 U.S. 696, 721 (1974). Thus, the Court concluded "it cannot be said that the application of the statute to an award of fees for services rendered prior to its effective date, in an action pending on that date, would cause 'manifest injustice'". *Id.*

The same can be said of section 102 of the Act in the context of this case. Respondent has no "vested" or "unconditional" right to a limit on the type of relief it is obligated to pay under Title VII. Section 102 merely expands the type of monetary relief

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[27] There is no issue as to whether the first prong of *Bradley* is satisfied. The distinction made in *Bradley* is between litigation among "mere private" individuals and matters of "great national concern". *Bradley*, 416 U.S. at 718-19. Two examples of "great national concern" were identified in *Bradley*—the issue in *Bradley* itself—school desegregation, and provisions of Title II of the 1964 Civil Rights Act. *See Bradley*, 416 U.S. at 718-19. With respect to desegregation, this Court stated "plaintiffs may be recognized as having rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system". *Id.* at 718. Referring to litigation involving Title II of the 1964 Civil Rights Act, this Court stated that the plaintiff functions "as a 'private attorney general', vindicating a policy that Congress considered of the highest priority". *Id.* at 719 (citations omitted). Title VII is also of vital public importance. Indeed, this Court stated that there was "an equally strong public interest" in the implementation of Title VII and Title II. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975).

available under Title VII. Further, section 102 brings no new or unanticipated obligations; that is, section 102 does not change the substantive conduct necessary for employers to conform their conduct to the law. The law absolutely prohibits—and has absolutely prohibited at least since Title VII became law in 1964—intentional discrimination. "The law has never countenanced that an employer may weigh the legal consequences of his discrimination and choose to continue his unlawful conduct. An employer cannot pay for the right to discriminate because no such 'right' has ever existed." *Robinson v. Davis Memorial Goodwill Indus.*, 790 F. Supp. 325, 332 (D.D.C. 1992)(Sporkin, J.); *cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1209 (1991)("the incremental cost of hiring women cannot justify discriminating against them"). Indeed, to argue that it would upset the settled expectations of the parties to impose compensatory or punitive damages once Title VII liability has been found, or, in the words of the Court of Appeals for the Fifth Circuit, it would impose an "additional or unforeseeable obligation" on respondents, is to adopt a particularly extreme version of the "bad man" theory of the law—that because there was no damages remedy, respondents had a legitimate or settled expectation that they could violate Title VII with impunity and without adverse consequences. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461-62 (1897).

The Seventh Circuit has articulated the view that "[t]he amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change". *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 229 (7th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3446 (Dec. 3, 1992)(No. 92-977). This argument proceeds upon two premises: (1) in deciding whether to follow the law, people weigh the potential costs of liability against the benefits to be gained from not following the law; and (2) when a person decides not to

follow the law, that person's expectations about the potential liability he or she risks are "settled expectations" that the law should recognize as valid, and protect.

The first premise may be correct as a descriptive matter—certainly one reason for increasing the costs of non-compliance with a law is precisely to encourage greater compliance with that law. The second premise is incorrect as a normative matter. Only a person's settled expectations about *compliance* with the law are entitled to recognition; indeed, that is one basis for the manifest injustice exception of *Bradley*. If one's substantive behavior conforms to the law in effect at the time of the behavior, that gives rise to an expectation of non-liability that the law must recognize as valid. The converse is not true. We assert that this Court should not protect as "settled" a person's expectations about the consequences of deliberate non-compliance with the law.[28]

Likewise, applying the jury trial provision in section 102 to pending cases will not alter vested rights or upset reasonable expectations. Defendants have no vested right to a bench trial. See *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)(the new law "takes away no substantive right, but simply changes the tribunal that is to hear the case", and thus should apply to pending claim); *see also Scarboro v. First Am. Nat'l Bank of Nashville*, 619 F.2d 621, 622 (6th Cir.) (per curiam) ("we do not believe that a jury resolution of plaintiff's claims poses any threat of injustice to either party"), *cert. denied*, 449 U.S. 1014 (1980); *cf. Bell v. New Jersey*, 461 U.S. 773, 794 (1983)(White, J. concurring)("there is no manifest injustice in a simple change of forum"). Further, respondent can hardly argue that it would have

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[28] Judge Posner's view has a surface plausibility because it is an arguably correct statement as applied to negligence law: under that legal regime, it is recognized that individuals may properly determine the amount of care to be taken by analyzing the probable costs of failing to take greater care. *United States v. Carroll Towing Co.*, 159 F.2d 169, 172-73 (2d Cir. 1947) (Hand, J.). However, even with respect to neligence, once a statute defines the required standard of care, the individual no longer has the power to trump that legislative determination by his or her private cost/benefit analysis.

altered its discriminatory or harassing conduct had it known that the trier of fact was to be a jury rather than a judge.

Both the damages and jury trial provisions of section 102 change the remedies or procedures to be applied to claims; they do not affect a defendant's vested rights or settled expectations. "'No one has a vested right in any given mode of procedure.'" *Ex Parte Collett*, 337 U.S. 55, 71 (1949)(quoting *Crane v. Hahlo*, 258 U.S. 142, 147 (1922)). Nor does a party have a vested right to a particular remedy for a violation of the law. "Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known. For this reason, absent contrary direction from Congress, courts are more inclined to apply retroactively changes in remedies than changes in liability." *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980).

Further, the "manifest injustice" inquiry required by *Bradley*—in cases where the statute is not clear on its face—focuses on the impact on the individual defendant if a statute is applied to a pending case. Thus, courts look to the reasonableness of the defendant's expectations as to whether its conduct is lawful, not the defendant's expectations as to the costs of admittedly unlawful behavior or the procedural mechanisms to address that behavior. The law should protect the victims of illegal discrimination, not preserve employers' calculations of the cost of committing unlawful acts.

In this case, the impact of applying section 102 on the respondent is minimal. Because the issue of intentional discrimination was uncontested on appeal, the only issue open for remand is the quantum of damages. There can be no injustice, manifest or otherwise, in requiring the respondent to pay damages for its intentional discrimination and in submitting that question to a jury for resolution.

IV. PRUDENTIAL CONSIDERATIONS SUPPORT APPLICATION OF THE ACT TO PENDING CASES.

There can be no injustice in providing a remedy here when Congress has already determined that existing remedies are inadequate. The application of section 102 to pending cases is consistent with the traditional presumption that "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done'". *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1033 (1992)(quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). This presumption is derived from the early years of the Republic. *See Franklin*, 112 S. Ct. at 1033. "In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803), . . . Chief Justice Marshall observed that our government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.'" *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 163). Here, Barbara Landgraf's vested right to be free from sexual harassment has been violated. Section 102 of the Civil Rights Act of 1991 provides a remedy to compensate victims like Barbara Landgraf for the wrongs they suffered in violation of Title VII. To deny that remedy to victims of sexual harassment or discrimination whose cases are pending, is to deny those victims a remedy for a violation of a vested legal right even though Congress has already expressed its intention, through its statutes, that such remedies should be available.

Further, it just cannot be that after responding to eight Supreme Court decisions, some of which were overturned,[29]

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[29] Section 101 responds to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), by defining "make and enforce contracts" to include the terms and conditions of the contract. Sections 104 and 105 respond to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), by setting forth the standard for an unlawful employment practice based on disparate impact. Section 107 responds to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), by providing remedies for mixed motive discrimination cases. Section 108 responds to *Martin v. Wilks*, 490 U.S. 755 (1989), by limiting challenges to litigated and consent judgments and orders resolving employment discrimination claims. Section 109 responds to *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991) by providing remedies to Americans in foreign countries who were discriminated against by American firms. Section 112 responds to *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), by allowing more individuals to challenge discriminatory seniority systems. Section 113 responds to *West Virginia Univ. Hosp. v. Casey*, 111 S. Ct. 1138 (1991), by permitting expert fees as part of attorney's fees. Section 114 responds to *Library of Congress v. Shaw*, 478 U.S. 310 (1986), by providing that individuals in cases that involve Federal agencies may receive the same interest to compensate for delay in payment as individuals in cases that involve nonpublic parties.

Congress intended the courts to continue applying them to pending cases. A finding of prospective application would lead to parallel, inconsistent lines of jurisprudence. Courts would be required to develop and expand their interpretations of these cases while, at the same time, developing and applying a new line of jurisprudence interpreting the 1991 Act. Confusion between these two lines of cases would be inevitable and unavoidable. The development of these parallel lines of cases, together with the resolution of confusion in their application, would also cause an enormous waste of judicial resources. Congress could not reasonably be said to have intended such a result.

The dangers of this parallel, inconsistent jurisprudence are not trivial, because civil rights cases take an inordinate amount of time to proceed through the courts. *See Estate of Reynolds v. Martin*, 985 F.2d 470, 475-76 (1993). For example, the discriminatory conduct in the eight cases overruled by the 1991 Act was, on average, nine years old by the time the case reached the Court. *See id.* If the 1991 Act does not apply to pending cases, the new remedies and procedures provided in the Act will not fully take effect in this century. That result cannot be—and we submit it is not—what Congress intended.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court remand her case to the court of appeals for an order directing the district court to conduct a jury trial on damages.

April 30, 1993.

Respectfully submitted,

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APPENDIX A

ATTORNEY GENERAL THORNBURGH'S MEMORANDUM FOR THE PRESIDENT

OCTOBER 22, 1990

Office of the Attorney General

Washington, D.C. 20530

October 22, 1990

MEMORANDUM FOR THE PRESIDENT

FROM: DICK THORNBURGH
ATTORNEY GENERAL

SUBJECT: S. 2104, the "Civil Rights Act of 1990"

This memorandum sets forth my views, and those of the Department of Justice, on S. 2104, the "Civil Rights Act of 1990." Although the bill contains some provisions that we both would like to see become law, S. 2104 is fatally flawed.

On May 17, 1990, in a Rose Garden speech marking the reauthorization of the Civil Rights Commission, you outlined the principles that would guide the approach of your Administration to civil rights legislation. You stated that: (1) civil rights legislation must operate to obliterate consideration of factors such as race and sex from employment decisions; (2) it must reflect fundamental principles of fairness that apply throughout our legal system; and (3) it should strengthen deterrents against harassment in the workplace based on race, sex, religion, or disability, but should not produce a new and unjustified lawyers' bonanza.

S. 2104 is not consistent with these principles. It creates powerful incentives for employers to adopt quotas in order to avoid litigation. It shields discriminatory consent decrees from legal challenge under many circumstances. And it contains several provisions that will serve primarily to foster litigation rather than conciliation and mediation.

I. INCENTIVES FOR EMPLOYERS TO ADOPT QUOTAS

Sections 3 and 4 of S. 2104 create strong incentives for employers to adopt quotas. Although putatively needed to "restore" the law that existed before the Supreme Court's opinion in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), these sections actually engage in a sweeping rewrite of the law of employment discrimination.

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, sex, ethnicity, or religion unless these practices are justified by business necessity. Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

In a series of cases decided in subsequent years, the Supreme Court refined and clarified the doctrine of disparate impact. In 1988, the Court greatly expanded the scope of the doctrine's coverage by applying it to subjective hiring and promotion practices (the Court had previously applied it only in cases involving objective criteria like diploma requirements and height-and-weight requirements). Justice O'Connor took this occasion to explain with great care both the reasons for the expansion and the need to be clear about the evidentiary standards that would operate to prevent the expansion of disparate impact doctrine from leading to quotas. In the course of her discussion, she pointed out:

> "[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . [E]xtending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such

> measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met." Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2787-2788 (1988) (plurality opinion).

The following year, in Wards Cove, the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff. Supporters of S. 2104 argue that this rule imposes an unreasonable burden on employees, and have claimed that legislation is needed to redress this imbalance. As you know, your Administration is prepared to accept the shifting of that burden to the defendant.

Sections 3 and 4 of S. 2104, however, go far beyond this shift in the burden of proof. First, the bill effectively creates a new presumption of discrimination whenever a plaintiff shows a sufficient statistical disparity in the racial, sexual, ethnic, or religious makeup of an employer's workforce, even if the plaintiff fails to identify any employment practice that has caused the disparity. Second, it defines "business necessity" in an unduly restrictive way. Finally, it imposes unreasonable restrictions on the type of evidence an employer may use in proving business necessity. In combination, these provisions will force employers to choose between (1) lengthy litigation, under rules rigged heavily against them, or (2) adopting policies that ensure that their numbers come out "right." Put another way, the bill exerts strong pressure on employers to adopt surreptitious quotas.

A. THE PRESUMPTION OF DISCRIMINATION ARISING FROM STATISTICAL DISPARITIES

Under Section 4, a plaintiff may bring a disparate impact case by alleging that a "group of employment practices results in" significant statistical disparity. "Group of employment practices" is very broadly defined in Section 3 to include any "combination

of employment practices that produces one or more decisions with respect to employment . . ."

That definition provides no limitation whatsoever: all practices that combine to produce, say, hiring decisions -- for example, use of a high school graduation requirement, plus an interview, plus job references, plus a requirement of a clean criminal record -- all could be lumped together as a single "group." Thus, if an employer's bottom line numbers are "wrong," the employer can be forced to prove that every practice is required by "business necessity."

Section 4 includes language emphasizing this point. Subsection (k)(1)(B)(i) states that "except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact" (emphasis added). The exception in clause (iii) seems at first to state the opposite, but actually takes away what it seems to give. Specificity is not required where the defendant has "failed to keep such records" as are "necessary to make [the] showing" of specifically which "practice or practices are responsible for the disparate impact."

Thus, the bill requires any employer whose workforce has the "wrong" bottom line numbers to point to records showing that one of its practices could have been challenged as "responsible for" the disparate impact. This is not a mere recordkeeping requirement: it is essentially a transfer from the plaintiff to the defendant of the obligation to make out the bulk of the plaintiff's prima facie case. The transfer of obligations is merely disguised as a recordkeeping requirement. An employer who cannot meet the burden created by this rule faces the prospect of defending all of its employment practices under the business necessity test.

This concealed obligation does not merely create all the record-keeping burdens one would imagine, but also a classic Catch-22: if an imbalance in the employer's workforce is caused

by something other than the employer's practices (by housing patterns, for example), so that the employer could not possibly have kept records showing which of its practices was responsible for the imbalance (because none was), a prima facie case will nevertheless be deemed to have been established because the group of practices "results in" a disparate impact and the employer cannot possible explain it from his own records.

The notion of allowing plaintiffs to attack a "group of practices" without showing that each member of the group has caused a disparate impact has absolutely no basis in Supreme Court precedent. All Supreme Court cases prior to Wards Cove focused on the impact of particular hiring practices, and plaintiffs have always targeted those specific practices. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982); Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777 (1988). The new rule created in S. 2104 is inconsistent with a fundamental principle of civil litigation: that the plaintiff is obliged to identify what act of the defendant is responsible for the plaintiff's injury. Even apart from other defects in Sections 3 and 4 of this bill, the treatment of "groups of practices" creates extremely powerful incentives for employers to adopt quotas rather than go through the litigation necessary to establish the "business necessity" of every one of their employment practices.

B. THE BUSINESS NECESSITY DEFINITION AND THE EVIDENTIARY RESTRICTIONS

The risk of surreptitious quotas created by the bill's provisions on "groups of practices" is compounded by S. 2104's unreasonably restrictive definition of "business necessity" and by evidentiary restrictions imposed on employers trying to meet the "business necessity" test. I will discuss each in turn.

1. The Business Necessity Definition

S. 2104 forces employers to defend any employment practice "involving selection" by showing a "significant relationship to successful performance of the job." This standard is new; it is found nowhere in any holding of the Supreme Court. On its face, it is defective because a narrow requirement of this type denies that there can be legitimate and desirable selection or promotion practices aimed at objectives other than successful job performance. Moreover, its very novelty guarantees that it will generate litigation for employers seeking to defend themselves. Finally, the bill's peculiar treatment of prior cases is likely to suggest to courts that ambiguities should be resolved against employers. In combination, these defects again make it likely that employers will adopt quotas rather than risk expensive litigation whose outcome will be highly uncertain.

First, simply taking the definition literally, S. 2104 would preclude employers from using hiring or promotion practices serving many legitimate business objectives. Consider, for example, an employer with a policy under which promotions are given only to employees who receive "outstanding" ratings in their current jobs. The justification for such a policy might be that it provides an incentive for all employees to perform in an outstanding manner, thereby promoting overall efficiency within the firm. Under S. 2104, however, the employer could not rely on that justification. Rather, he or she would have to attempt to prove that outstanding performance in an employee's current job was "significant[ly] relat[ed] to successful performance" of the next job. In many cases, this might be impossible.

There is no sound policy reason for confining in this way the justifications an employer may offer for its selection practices. Nor were such restrictions required by Supreme Court decisions prior to Wards Cove. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979); Watson v. Fort Worth Bank & Trust Co., 108 S. Ct. 2777, 2790 (1988) (plurality opinion). Indeed, the Wards Cove dissent itself made clear that

under Griggs any "valid business purpose" would suffice. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2129 (1989) (Stevens, J., dissenting).

The statement in S. 2104 that the definition of business necessity is intended to codify Griggs cannot alter the inconsistency between the bill's text and the language of Griggs, or the inconsistency between the bill's text and almost two decades of Supreme Court precedent interpreting Griggs. Instead, it merely guarantees confusion as courts attempt to sort out precisely what Congress had in mind. This confusion will be time-consuming and very expensive. And it will bring no benefit to the victims of discrimination.

Finally, in attempting to interpret the confusing definition of "business necessity," some courts would likely come to the conclusion that Congress intended to bring about certain highly undesirable results. First, the bill states that it is designed to overrule Wards Cove's "treatment of business necessity as a defense." Part of that treatment of business necessity, though, was the Court's rejection of the view that an employer is required to show that the "challenged practice [is] 'essential' or 'indispensable' to the employer's business." Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989). As the Supreme Court noted, "this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils," including quotas. Id. Rather, the Court quite reasonably found that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Id. at 2125-2126 (citing Watson and Baezer as well as Griggs). On this issue, as pointed out above, the dissent in Wards Cove is in agreement.

In light of these statements, a statutory provision overruling "the treatment of business necessity" in Wards Cove could reasonably be interpreted by many courts as returning the bill's definition of business necessity to the widely criticized standard included in the original incarnation of S. 2104 ("essential to effective job performance"). This inference would be strengthened

by two other provisions of the bill: Section 2 ("Findings and Purposes") and Section 11 ("Construction"). Working in tandem, Sections 2 and 11 would likely lead some courts to resolve ambiguities in the bill against prior decisions by the Supreme Court and against defendants.

2. Evidentiary Restrictions

Finally, employers who must attempt to meet the business necessity test must do so by means of "demonstrable evidence." This is a new term invented by the bill, and no definition is provided. The bill contains a long list of types of evidence that courts may "receive," but bill does not say that any of these necessarily constitutes "demonstrable evidence." Courts will likely understand the use of this new term (particularly in light of Sections 2 and 11 of the bill) to mean that Congress is referring to some category of evidence that is narrower than the category of evidence on which courts would otherwise rely. The effect of this provision, then, will apparently be to indirectly raise the burden of proof on the defendant beyond what it would otherwise be.

I am not aware that any justification has been offered for restricting the kind of evidence on which courts may rely in this context. Nor do I believe that it is advisable to force the courts to engage in guessing games about the meaning of a novel term like "demonstrable evidence." As with several other aspects of Sections 3 and 4 of S. 2104, this provision will cause uncertainty among attorneys who must advise employers about the meaning of the law, and it will cause confusion in the courts. No good purpose will be served, and a great deal of pointless expense will be imposed on those who must live under this new legislation.

C. CONCLUSION

So far as I am aware, there is no reported judicial decision indicating any need for a legislative modification of the manner in which the courts handle "group[s] of employment practices" under disparate impact theory. The rule created in S. 2104,

moreover, is contrary to fundamental principles of civil litigation, and it is likely to lead in practice to unjust results.

There is no sound policy reason for the imposition of artificial restrictions of the kind created by S. 2104 on the justifications that employers may offer for legitimate employment practices. Similarly, there is no sound policy reason for imposing on defendants evidentiary restrictions that exist nowhere else in the law and that are not even clearly spelled out in the proposed statute.

The effect of these proposed changes in the law is clear: these provisions, if they are enacted, would exert strong pressure on employers to avoid having to defend their employment practices; the only practicable way for employers to do this would be to avoid the statistical disparities that would require them to mount such a defense. In short, many employers will see no real alternative to adopting quotas.

II. FUNDAMENTAL FAIRNESS AND THE INSULATION OF QUOTAS FROM LEGAL CHALLENGE

The bill in its current form also promotes quotas through its treatment of discriminatory consent decrees. It does this by totally denying certain individuals access to the courts to challenge illegal agreements -- in which these individuals had no part -- prescribing quotas that exclude them from employment opportunities.

Section 6 of S. 2104 would overrule the Supreme Court's decision in Martin v. Wilks, 109 S. Ct. 2180 (1989). That case arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every situation. The Court held that white firefighters who had not been parties to a consent decree that mandated racial preferences could have their day in court to contend that the decree violated their civil rights.

Section 6 would in many circumstances cut off this right and deny some persons, who were never notified of these decrees and had no chance to challenge them, their right to sue. For example, a plaintiff denied a promotion as a result of a discriminatory consent decree in place ten years before the plaintiff was hired would in some circumstances be precluded by Section 6 from challenging the decree.

At the outset, it must be stressed that only certain settlements or consent decrees can be successfully challenged after Martin v. Wilks: those containing provisions that violate an innocent third party's rights under Title VII or the Fourteenth Amendment. The only justification offered for this provision is the systemic interest in the finality of judicial resolution of disputes. But while that interest is important, it should not be pursued at the cost of the requirement of fundamental fairness that underlies our judicial system, in which individuals are traditionally guaranteed a meaningful opportunity to assert their interests in court before they are bound by judicial action.

Moreover, the concern at which Section 6 is assertedly directed, viz. the fear of repeated challenges to the same decree, is largely chimerical. Existing legal doctrines are already adequate to head off nonmeritorious challenges to decrees. The doctrines of law of the case, res judicata, and stare decisis will allow courts to deal with them summarily at little expense in time or money to the parties. In addition, the rules of joinder make it relatively easy for parties to ensure that affected people have their day in court in the original action. The threat of an award of attorney fees against the losing party who brings a frivolous suit is a further deterrent to such challenges.

The bill's treatment of discriminatory seniority systems is in stark contrast with its treatment of discriminatory consent decrees. In dealing with seniority systems, Section 7(b) of the bill appropriately corrects a defect in current law by allowing a plaintiff to challenge a discriminatory seniority system or practice at the time it is applied to the plaintiff. Current law requires the challenge to be made at the time of the adoption of the seniority

system. Consistent with the view taken by your Administration, proponents of S. 2104 have rightly argued that this is unreasonable and should be corrected by legislation.

So far as I am aware, S. 2104's sponsors have given no explanation for this inconsistency between Sections 6 and 7(b) of their bill. The effect of it, however, is quite clear: unlike seniority systems, consent decrees have frequently contained provisions establishing hiring and promotion quotas or racial preferences. Section 6 prevents legal challenges to such provisions. Thus, far from enhancing civil rights, Section 6 severely abridges them.

Section 9 contains a provision complementing the provisions in Section 6. For the first time, Title VII would say that certain civil rights plaintiffs -- those challenging the legality of quotas adopted under a consent decree -- could be required to pay attorneys fees where their lawsuit was neither frivolous nor otherwise unreasonable. The clear effect would be to discourage many challenges to illegal discrimination. The creation of fundamentally unfair obstacles to the vindication of our citizens' civil rights has no place in a civil rights bill.

Proponents of S. 2104 argue that Section 13 of the bill, which states that nothing in the bill "shall be construed to require or encourage an employer to adopt hiring or promotion quotas," is a sufficient answer to the concerns raised here and in Part I of this memorandum. In fact, however, Section 13 is entirely unresponsive to them. The problem with Sections 3 and 4 is not that they directly require or encourage quotas, but rather that employers will in fact choose to adopt quotas in order to avoid having to defend their hiring practices under the unreasonable litigation rules established by the bill. And the problem with Section 6 is not that it requires quotas, but that it insulates them from challenge. In fact, in its present form, Section 13 has an exception from the anti-quota language (and from all other provisions in the bill) for quotas that might be contained in some court-ordered remedies, affirmative action plans, or conciliation agreements.

III. EXPANSION OF REMEDIES UNDER TITLE VII AND PROVISIONS AFFECTING THE INCENTIVES FOR LITIGATION

Section 8 of S. 2104 radically alters the Civil Rights Act of 1964 by making available unlimited compensatory damages, as well as punitive damages and jury trials, in most cases under Title VII.

As you noted in your May 17 speech, federal law should provide an adequate deterrent against harassment in the workplace, and additional remedies are needed to accomplish this goal. Although S. 2104 imposes a partial cap on punitive damages, thereby setting an important precedent in the area of federal tort remedies, the expansion of remedies contained in Section 8 is excessive. Section 8 is not confined to filling the gap where existing remedies are inadequate, such as in many cases of sexual harassment. Rather, it imports into our employment discrimination laws the entire panoply of tort remedies, punitive damages, and jury trials, which runs counter to the concepts of mediation and conciliation upon which Title VII is based. This will create unnecessary and counterproductive litigation, serving the interests of lawyers far more than the interests of aggrieved employees.

Other provisions in S. 2104 will also contribute unnecessarily to fostering litigation instead of conciliation. An amendment to 42 U.S.C. 2000e-5(k), for example, permits plaintiffs to recover attorneys fees for continuing to litigate even if the judgment they ultimately obtain is less favorable than a settlement offer they rejected. Similarly, a new paragraph (2) in 42 U.S.C. 2000e-5k creates special rules impeding waiver of attorney's fees as part of settlement, which will inevitably discourage settlements because defendants will not be able to estimate accurately the total cost of the settlement to which they are being asked to agree.

Several other provisions of this bill have little to do with promoting civil rights. Rather, they seem principally designed to give plaintiffs special and unwarranted litigation advantages.

Section 7(a) gives plaintiffs 2 years, rather than 180 days (or, in certain cases, 300 days), to file discrimination claims. Section 11 creates a special legislative rule of construction for civil rights cases that seems intended to encourage courts to resolve cases in favor of plaintiffs whenever possible. And Section 15 unfairly applies the changes in the law made by S. 2104 to cases already decided.

IV. CONCLUSION

S. 2104, in the form in which it has been presented to you, is seriously flawed. While it contains certain desirable provisions, these sections are greatly outweighed by the portions of the bill that are objectionable in the particulars specified above. Taken as a whole, S. 2104 would do far more to disrupt our legal system and to disappoint the legitimate expectations of our citizens for equal opportunity than it would to advance the goal, to which you and I are both committed, of strengthening the laws against employment discrimination.

APPENDIX B

THE CIVIL RIGHTS ACT OF 1991

Public Law 102-166
102d Congress

An Act

To amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v.

Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I—FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.".

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

"SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(2) DISABILITY.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT.—In cases where a discriminatory practice

involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

"(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

"(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

"(3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

"(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

"(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more

calendar weeks in the current or preceding calendar year, $100,000; and

"(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

"(4) CONSTRUCTION.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) JURY TRIAL.—If a complaining party seeks compensatory or unitive [sic] damages under this section—

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

"(d) DEFINITIONS.—As used in this section:

"(1) COMPLAINING PARTY.—The term 'complaining party' means—

"(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

"(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

"(2) DISCRIMINATORY PRACTICE.—The term 'discriminatory practice' means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

SEC. 103. ATTORNEY'S FEES.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting ", 1977A" after "1977".

SEC. 104. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to Section 717.".

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

"(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

"(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

"(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.".

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

SEC. 106. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by Section 105) is further amended by adding at the end the following new subsection:

"(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.".

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) **IN GENERAL**—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by Sections 105 and 106) is further amended by adding at the end the following new subsection:

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.".

(b) **ENFORCEMENT PROVISIONS.**—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended—

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and

(3) by adding at the end the following new subparagraph:

"(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

"(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

"(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).".

SEC. 108. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105, 106, and 107 of this title) is further amended by adding at the end the following new subsection:

"(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

"(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

"(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

"(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

"(II) a reasonable opportunity to present objections to such judgment or order; or

"(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

"(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

"(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

"(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.".

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) DEFINITION OF EMPLOYEE.—Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) and section 101(4) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(4)) are each amended by adding at the end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.".

(b) EXEMPTION.—

(1) CIVIL RIGHTS ACT OF 1964.—Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended—

(A) by inserting "(a)" after Sec. 702."; and

(B) by adding at the end the following:

"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control, of the employer and the corporation.".

(2) AMERICANS WITH DISABILITIES ACT OF 1990.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following new subsection:

"(c) COVERED ENTITIES IN FOREIGN COUNTRIES.—

"(1) IN GENERAL.—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee

in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

"(2) CONTROL OF CORPORATION.—

"(A) PRESUMPTION.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

"(B) EXCEPTION.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(C) DETERMINATION.—For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

"(i) the interrelation of operations;

"(ii) the common management;

"(iii) the centralized control of labor relations; and

"(iv) the common ownership of financial control, of the employer and the corporation.".

(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 110. TECHNICAL ASSISTANCE TRAINING INSTITUTE.

(a) TECHNICAL ASSISTANCE.—Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following new subsection:

"(j)(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

"(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

"(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of the enactment of this Act.

SEC. 111. EDUCATION AND OUTREACH.

Section 705(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4(h)) is amended—

(1) by inserting "(1)" after "(h)"; and

(2) by adding at the end the following new paragraph:

"(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—

"(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination,

concerning rights and obligations under this title or such law, as the case may be.".

SEC. 112. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by inserting "(1)" before "A charge under this section"; and

(2) by adding at the end the following new paragraph:

"(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by

the application of the seniority system or provision of the system.".

SEC. 113. AUTHORIZING AWARD OF EXPERT FEES.

(a) REVISED STATUTES.—Section 722 of the Revised Statutes is amended—

(1) by designating the first and second sentences as subsections (a) and (b), respectively, and indenting accordingly; and

(2) by adding at the end the following new subsection:

"(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee.".

(b) CIVIL RIGHTS ACT OF 1964.—Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee".

SEC. 114. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking "thirty days" and inserting "90 days"; and

(2) in subsection (d), by inserting before the period", and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.".

SEC. 115. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

(1) by striking paragraph (2);

(2) by striking the paragraph designation in paragraph (1);

(3) by striking "Section 6 and" and inserting "Section"; and

(4) by adding at the end the following:

"If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.".

SEC. 116. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

SEC. 117. COVERAGE OF HOUSE OF REPRESENTATIVES AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) COVERAGE OF THE HOUSE OF REPRESENTATIVES.—

(1) IN GENERAL.—Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) EMPLOYMENT IN THE HOUSE.—

(A) APPLICATION.—The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) ADMINISTRATION.—

(i) IN GENERAL.—In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) RESOLUTION.—The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

(C) EXERCISE OF RULEMAKING POWER.—The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(b) INSTRUMENTALITIES OF CONGRESS.—

(1) IN GENERAL.—The rights and protections under this title and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) ESTABLISHMENT OF REMEDIES AND PROCEDURES BY INSTRUMENTALITIES.—The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively, except for the employees who are defined as Senate employees, in section 301(c)(1).

(3) REPORT TO CONGRESS.—The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) DEFINITION OF INSTRUMENTALITIES.—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

(5) CONSTRUCTION.—Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of title VII for the Civil Rights Act of 1964 (42 U.S.C. 2000e-16).

SEC. 118. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

TITLE II—GLASS CEILING

SEC. 201. SHORT TITLE.

This title may be cited as the "Glass Ceiling Act of 1991".

SEC. 202. FINDINGS AND PURPOSE.

(a) FINDINGS.— Congress finds that—

(1) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business;

(2) artificial barriers exist to the advancement of women and minorities in the workplace;

(3) United States corporations are increasingly relying on women and minorities to meet employment requirements and

are increasingly aware of the advantages derived from a diverse work force;

(4) the "Glass Ceiling Initiative" undertaken by the Department of Labor, including the release of the report entitled "Report on the Glass Ceiling Initiative", has been instrumental in raising public awareness of—

(A) the underrepresentation of women and minorities at the management and decisionmaking levels in the United States work force;

(B) the underrepresentation of women and minorities in line functions in the United States work force;

(C) the lack of access for qualified women and minorities to credential-building developmental opportunities; and

(D) the desirability of eliminating artificial barriers to the advancement of women and minorities to such levels;

(5) the establishment of a commission to examine issues raised by the Glass Ceiling Initiative would help—

(A) focus greater attention on the importance of eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business; and

(B) promote work force diversity;

(6) a comprehensive study that includes analysis of the manner in which management and decisionmaking positions are filled, the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement, and the compensation programs and reward structures utilized in the corporate sector would assist in the establishment of practices and policies promoting opportunities for, and eliminating artificial barriers to, the advancement of women and minorities to management and decisionmaking positions; and

(7) a national award recognizing employers whose practices and policies promote opportunities for, and eliminate artificial barriers to, the advancement of women and minorities will foster the advancement of women and minorities into higher level positions by—

(A) helping to encourage United States companies to modify practices and policies to promote opportunities for, and eliminate artificial barriers to, the upward mobility of women and minorities; and

(B) providing specific guidance for other United States employers that wish to learn how to revise practices and policies to improve the access and employment opportunities of women and minorities.

(b) PURPOSE.—The purpose of this title is to establish—

(1) a Glass Ceiling Commission to study—

(A) the manner in which business fills management and decisionmaking positions;

(B) the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions; and

(C) the compensation programs and reward structures currently utilized in the workplace; and

(2) an annual award for excellence in promoting a more diverse skilled work force at the management and decisionmaking levels in business.

SEC. 203. ESTABLISHMENT OF GLASS CEILING COMMISSION.

(a) IN GENERAL.—There is established a Glass Ceiling Commission (referred to in this title as the "Commission"), to conduct a study and prepare recommendations concerning—

(1) eliminating artificial barriers to the advancement of women and minorities; and

(2) increasing the opportunities and developmental experiences of women and minorities to foster advancement of women and minorities to management and decisionmaking positions in business.

(b) MEMBERSHIP.—

(1) COMPOSITION.—The Commission shall be composed of 21 members, including—

(A) six individuals appointed by the President;

(B) six individuals appointed jointly by the Speaker of the House of Representatives and the Majority Leader of the Senate;

(C) one individual appointed by the Majority Leader of the House of Representatives;

(D) one individual appointed by the Minority Leader of the House of Representatives;

(E) one individual appointed by the Majority Leader of the Senate;

(F) one individual appointed by the Minority Leader of the Senate;

(G) two Members of the House of Representatives appointed jointly by the Majority Leader and the Minority Leader of the House of Representatives;

(H) two Members of the Senate appointed jointly by the Majority Leader and the Minority Leader of the Senate; and

(I) the Secretary of Labor.

(2) CONSIDERATIONS.—In making appointments under subparagraphs (A) and (B) of paragraph (1), the appointing authority shall consider the background of the individuals, including whether the individuals—

(A) are members of organizations representing women and minorities, and other related interest groups;

(B) hold management or decisionmaking positions in corporation or other business entities recognized as leaders on issues relating to equal employment opportunity; and

(C) possess academic expertise or other recognized ability regarding employment issues.

(3) BALANCE.—In making the appointments under subparagraphs (A) and (B) of paragraph (1), each appointing authority shall seek to include an appropriate balance of appointees from among the groups of appointees described in subparagraphs (A), (B), and (C) of paragraph (2).

(c) CHAIRPERSON.—The Secretary of Labor shall serve as the Chairperson of the Commission.

(d) TERM OF OFFICE.—Members shall be appointed for the life of the Commission.

(e) VACANCIES.—Any vacancy occurring in the membership of the Commission shall be filled in the same manner as the original appointment for the position being vacated. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(f) MEETINGS.—

(1) MEETINGS PRIOR TO COMPLETION OF REPORT.—The Commission shall meet not fewer than five times in connection with and pending the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(2) MEETINGS AFTER COMPLETION OF REPORT.—The Commission shall meet once each year after the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(g) QUORUM.—A majority of the Commission shall constitute a quorum for the transaction of business.

(h) COMPENSATION AND EXPENSES.—

(1) COMPENSATION.—Each member of the Commission who is not an employee of the Federal Government shall receive compensation at the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day the member is engaged in the performance of duties for the Commission, including attendance at meetings and conferences of the Commission, and travel to conduct the duties of the Commission.

(2) TRAVEL EXPENSES.—Each member of the Commission shall receive travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, for each day the member is engaged in the performance of duties away from the home or regular place of business of the member.

(3) EMPLOYMENT STATUS.—A member of the Commission, who is not otherwise an employee of the Federal Government, shall not be deemed to be an employee of the Federal Government except for the purposes of—

(A) the tort claims provisions of chapter 171 of title 28, United States Code; and

(B) subchapter I of chapter 81 of title 5, United States Code, relating to compensation for work injuries.

SEC. 204. RESEARCH ON ADVANCEMENT OF WOMEN AND MINORITIES TO MANAGEMENT AND DECISIONMAKING POSITIONS IN BUSINESS.

(a) ADVANCEMENT STUDY.—The Commission shall conduct a study of opportunities for, and artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business. In conducting the study, the Commission shall—

(1) examine the preparedness of women and minorities to advance to management and decisionmaking positions in business;

(2) examine the opportunities for women and minorities to advance to management and decisionmaking positions in business;

(3) conduct basic research into the practices, policies, and manner in which management and decisionmaking positions in business are filled;

(4) conduct comparative research of businesses and industries in which women and minorities are promoted to management and decisionmaking positions, and businesses and industries in which women and minorities are not promoted to management and decisionmaking positions;

(5) compile a synthesis of available research on programs and practices that have successfully led to the advancement of women and minorities to management and decisionmaking positions in business, including training programs, rotational assignments, developmental programs, reward programs, employee benefit structures, and family leave policies; and

(6) examine any other issues and information relating to the advancement of women and minorities to management and decisionmaking positions in business.

(b) REPORT.—Not later than 15 months after the date of the enactment of this Act, the Commission shall prepare and submit to the President and the appropriate committees of Congress a written report containing—

(1) the findings and conclusions of the Commission resulting from the study conducted under subsection (a); and

(2) recommendations based on the findings and conclusions described in paragraph (1) relating to the promotion of opportunities for, and elimination of artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business, including recommendations for—

(A) policies and practices to fill vacancies at the management and decisionmaking levels;

(B) developmental practices and procedures to ensure that women and minorities have access to opportunities to gain the exposure, skills, and expertise necessary to assume management and decisionmaking positions;

(C) compensation programs and reward structures utilized to reward and retain key employees; and

(D) the use of enforcement (including such enforcement techniques as litigation, complaint investigations, compliance reviews, conciliation, administrative regulations, policy guidance, technical assistance, training, and public education) of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial barriers to the advancement of women and minorities in employment.

(c) ADDITIONAL STUDY.—The Commission may conduct such additional study of the advancement of women and minorities to management and decisionmaking positions in business as a majority of the members of the Commission determines to be necessary.

SEC. 205. ESTABLISHMENT OF THE NATIONAL AWARD FOR DIVERSITY AND EXCELLENCE IN AMERICAN EXECUTIVE MANAGEMENT.

(a) IN GENERAL.—There is established the National Award for Diversity and Excellence in American Executive Management, which shall be evidenced by a medal bearing the inscription "Frances Perkins-Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management". The medal shall be of such design and materials, and bear such additional inscriptions, as the Commission may prescribe.

(b) CRITERIA FOR QUALIFICATION.—To qualify to receive an award under this section a business shall—

(1) submit a written application to the Commission, at such time, in such manner, and containing such information as the Commission may require, including at a minimum information that demonstrates that the business has made substantial effort to promote the opportunities and developmental experiences of women and minorities to foster advancement to management and decisionmaking positions within the business, including the elimination of artificial barriers to the advancement of women and minorities, and deserves special recognition as a consequence; and

(2) meet such additional requirements and specifications as the Commission determines to be appropriate.

(c) MAKING AND PRESENTATION OF AWARD.—

(1) AWARD.—After receiving recommendations from the Commission, the President or the designated representative of the President shall annually present the award described in subsection (a) to businesses that meet the qualifications described in subsection (b).

(2) PRESENTATION.—The President or the designated representative of the President shall present the award with such ceremonies as the President or the designated representative of the President may determine to be appropriate.

(3) PUBLICITY.—A business that receives an award under this section may publicize the receipt of the award and use the award in its advertising, if the business agrees to help

other United States businesses improve with respect to the promotion of opportunities and developmental experiences of women and minorities to foster the advancement of women and minorities to management and decisionmaking positions.

(d) BUSINESS.—For the purposes of this section, the term "business" includes—

(1)(A) a corporation including nonprofit corporations;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in subparagraphs (A) through (D);

(2) an education referral program, a training program, such as an apprenticeship or management training program or a similar program; and

(3) a joint program formed by a combination of any entities described in paragraph (1) or (2).

SEC. 206. POWERS OF THE COMMISSION.

(a) IN GENERAL.—The Commission is authorized to—

(1) hold such hearings and sit and act at such times;

(2) take such testimony;

(3) have such printing and binding done;

(4) enter into such contracts and other arrangements;

(5) make such expenditures; and

(6) take such other actions;

as the Commission may determine to be necessary to carry out the duties of the Commission.

(b) OATHS.—Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(c) OBTAINING INFORMATION FROM FEDERAL AGENCIES.—The Commission may secure directly from any Federal agency such information as the Commission may require to carry out its duties.

(d) VOLUNTARY SERVICE.—Notwithstanding section 1342 of title 31, United States Code, the Chairperson of the

Commission may accept for the Commission voluntary services provided by a member of the Commission.

(e) GIFTS AND DONATIONS.—The Commission may accept, use, and dispose of gifts or donations of property in order to carry out the duties of the Commission.

(f) USE OF MAIL.—The Commission may use the United States mails in the same manner and under the same conditions as Federal agencies.

SEC. 207. CONFIDENTIALITY OF INFORMATION.

(a) INDIVIDUAL BUSINESS INFORMATION.—

(1) IN GENERAL.—Except as provided in paragraph (2), and notwithstanding section 552 of title 5, United States Code, in carrying out the duties of the Commission, including the duties described in sections 204 and 205, the Commission shall maintain the confidentiality of all information that concerns—

(A) the employment practices and procedures of individual businesses; or

(B) individual employees of the businesses.

(2) CONSENT.—The content of any information described in paragraph (1) may be disclosed with the prior written consent of the business or employee, as the case may be, with respect to which the information is maintained.

(b) AGGREGATE INFORMATION.—In carrying out the duties of the Commission, the Commission may disclose—

(1) information about the aggregate employment practices or procedures of a class or group of businesses; and

(2) information about the aggregate characteristics of employees of the businesses, and related aggregate information about the employees.

SEC. 208. STAFF AND CONSULTANTS.

(a) STAFF.—

(1) APPOINTMENT AND COMPENSATION.—The Commission may appoint and determine the compensation of

such staff as the Commission determines to be necessary to carry out the duties of the Commission.

(2) LIMITATIONS.—The rate of compensation for each staff member shall not exceed the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code for each day the staff member is engaged in the performance of duties for the Commission. The Commission may otherwise appoint and determine the compensation of staff without regard to the provisions of title 5, United States Code, that govern appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, that relate to classification and General Schedule pay rates.

(b) EXPERTS AND CONSULTANTS.—The Chairperson of the Commission may obtain such temporary and intermittent services of experts and consultants and compensate the experts and consultants in accordance with section 3109(b) of title 5, United States Code, as the Commission determines to be necessary to carry out the duties of the Commission.

(c) DETAIL OF FEDERAL EMPLOYEES.—On the request of the Chairperson of the Commission, the head of any Federal agency shall detail, without reimbursement, any of the personnel of the agency to the Commission to assist the Commission in carrying out its duties. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(d) TECHNICAL ASSISTANCE.—On the request of the Chairperson of the Commission, the head of a Federal agency shall provide such technical assistance to the Commission as the Commission determines to be necessary to carry out its duties.

SEC. 209. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this title. The sums shall remain available until expended, without fiscal year limitation.

SEC. 210. TERMINATION.

(a) COMMISSION.—Notwithstanding section 15 of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall terminate 4 years after the date of the enactment of this Act.

(b) AWARD.—The authority to make awards under section 205 shall terminate 4 years after the date of the enactment of this Act.

TITLE III—GOVERNMENT EMPLOYEE RIGHTS

SEC. 301. GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.

(a) SHORT TITLE.—This title may be cited as the "Government Employee Rights Act of 1991".

(b) PURPOSE.—The purpose of this title is to provide procedures to protect the right of Senate and other government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) DEFINITIONS.—For purposes of this title:

(1) SENATE EMPLOYEE.—The term "Senate employee" or "employee" means—

(A) any employee whose pay is disbursed by the Secretary of the Senate;

(B) any employee of the Architect of the Capitol who is assigned to the Senate Restaurants or to the Superintendent of the Senate Office Buildings;

(C) any applicant for a position that will last 90 days or more and that is to be occupied by an individual described in subparagraph (A) or (B); or

(D) any individual who was formerly an employee described in subparagraph (A) or (B) and whose claim of a violation arises out of the individual's Senate employment.

(2) HEAD OF EMPLOYING OFFICE.—The term "head of employing office" means the individual who has final authority to appoint, hire, discharge, and set the terms, conditions or privileges of the Senate employment of an employee.

(3) VIOLATION.—The term "violation" means a practice that violates section 302 of this title.

SEC. 302. DISCRIMINATORY PRACTICES PROHIBITED.

All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) handicap or disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102-104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-14).

SEC. 303. ESTABLISHMENT OF OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES.

(a) IN GENERAL.—There is established, as an office of the Senate, the Office of Senate Fair Employment Practices (referred to in this title as the "Office"), which shall—

(1) administer the processes set forth in sections 305 through 307;

(2) implement programs for the Senate to heighten awareness of employee rights in order to prevent violations from occurring.

(b) DIRECTOR.—

(1) IN GENERAL.—The Office shall be headed by a Director (referred to in this title as the "Director") who shall be appointed by the President pro tempore, upon the recommendation of the Majority Leader in consultation with

the Minority Leader. The appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. The Director shall be appointed for a term of service which shall expire at the end of the Congress following the Congress during which the Director is appointed. A Director may be reappointed at the termination of any term of service. The President pro tempore, upon the joint recommendation of the Majority Leader in consultation with the Minority Leader, may remove the Director at any time.

(2) SALARY.—The President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader, shall establish the rate of pay for the Director. The salary of the Director may not be reduced during the employment of the Director and shall be increased at the same time and in the same manner as fixed statutory salary rates within the Senate are adjusted as a result of annual comparability increases.

(3) ANNUAL BUDGET.—The Director shall submit an annual budget request for the Office to the Committee on Appropriations.

(4) APPOINTMENT OF DIRECTOR.—The first Director shall be appointed and begin service within 90 days after the date of enactment of this Act, and thereafter the Director shall be appointed and begin service within 30 days after the beginning of the session of the Congress immediately following the termination of a Director's term of service or within 60 days after a vacancy occurs in the position.

(c) STAFF OF THE OFFICE.—

(1) APPOINTMENT.—The Director may appoint and fix the compensation of such additional staff, including hearing officers, as are necessary to carry out the purposes of this title.

(2) DETAILEES.—The Director may, with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, use on a reimbursable or nonreimbursable basis the services of any such department or agency, including the services of members

or personnel of the General Accounting Office Personnel Appeals Board.

(3) CONSULTANTS.—In carrying out the functions of the Office, the Director may procure the temporary (not to exceed 1 year) or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946 (2 U.S.C. 72a(i)).

(d) EXPENSES OF THE OFFICE.—In fiscal year 1992, the expenses of the Office shall be paid out of the Contingent Fund of the Senate from the appropriation account Miscellaneous Items. Beginning in fiscal year 1993, and for each fiscal year thereafter, there is authorized to be appropriated for the expenses of the Office such sums as shall be necessary to carry out its functions. In all cases, expenses shall be paid out of the Contingent Fund of the Senate upon vouchers approved by the Director, except that a voucher shall not be required for—

(1) the disbursement of salaries of employees who are paid at an annual rate;

(2) the payment of expenses for telecommunications services provided by the Telecommunications Department, Sergeant at Arms, United States Senate;

(3) the payment of expenses for stationery supplies purchased through the Keeper of the Stationery, United States Senate;

(4) the payment of expenses for postage to the Postmaster, United States Senate; and

(5) the payment of metered charges on copying equipment provided by the Sergeant at Arms, United States Senate.

The Secretary of the Senate is authorized to advance such sums as may be necessary to defray the expenses incurred in carrying out this title. Expenses of the Office shall include authorized travel for personnel of the Office.

(e) RULES OF THE OFFICE.—The Director shall adopt rules governing the procedures of the Office, including the procedures of hearing boards, which rules shall be submitted to the President pro tempore for publication in the Congressional Record. The rules may be amended in the same manner. The

Director may consult with the Chairman of the Administrative Conference of the United States on the adoption of rules.

(f) REPRESENTATION BY THE SENATE LEGAL COUNSEL.—For the purpose of representation by the Senate Legal Counsel, the Office shall be deemed a committee, within the meaning of title VII of the Ethics in Government Act of 1978 (2 U.S.C. 288, et seq.).

SEC. 304. SENATE PROCEDURE FOR CONSIDERATION OF ALLEGED VIOLATIONS.

The Senate procedure for consideration of alleged violations consists of 4 steps as follows:

(1) Step I, counseling, as set forth in section 305.

(1) Step II, mediation, as set forth in section 306.

(3) Step III, formal complaint and hearing by a hearing board, as set forth in section 307.

(4) Step IV, review of a hearing board decision, as set forth in section 308 or 309.

SEC. 305. STEP I: COUNSELING.

(a) IN GENERAL.—A Senate employee alleging a violation may request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the alleged violation forming the basis of the request for counseling occurred. No request for counseling may be made until 10 days after the first Director begins service pursuant to section 303(b)(4).

(b) PERIOD OF COUNSELING.—The period for counseling shall be 30 days unless the employee and the Office agree to reduce the period. The period shall begin on the date the request for counseling is received.

(c) EMPLOYEES OF THE ARCHITECT OF THE CAPITOL AND CAPITOL POLICE.—In the case of an employee of the Architect of the Capitol or an employee who is a member of the Capitol Police, the Director may refer the employee to the Architect of the Capitol or the Capitol Police Board for resolution

of the employee's complaint through the internal grievance procedures of the Architect of the Capitol or the Capitol Police Board for a specific period of time, which shall not count against the time available for counseling or mediation under this title.

SEC. 306. STEP II: MEDIATION.

(a) IN GENERAL.—Not later than 15 days after the end of the counseling period, the employee may file a request for mediation with the Office. Mediation may include the Office, the employee, and the employing office in a process involving meetings with the parties separately or jointly for the purpose of resolving the dispute between the employee and the employing office.

(b) MEDIATION PERIOD.—The mediation period shall be 30 days beginning on the date the request for mediation is received and may be extended for an additional 30 days at the discretion of the Office. The Office shall notify the employee and the head of the employing office when the mediation period has ended.

SEC. 307. STEP III: FORMAL COMPLAINT AND HEARING.

(a) FORMAL COMPLAINT AND REQUEST FOR HEARING.—Not later than 30 days after receipt by the employee of notice from the Office of the end of the mediation period, the Senate employee may file a formal complaint with the Office. No complaint may be filed unless the employee has made a timely request for counseling and has completed the procedures set forth in sections 305 and 306.

(b) HEARING BOARD.—A board of 3 independent hearing officers (referred to in this title as "hearing board"), who are not Senators or officers or employees of the Senate, chosen by the Director (one of whom shall be designated by the Director as the presiding hearing officer) shall be assigned to consider each complaint filed under this section. The Director shall appoint hearing officers after considering any candidates who are recommended to the Director by the Federal Mediation and

Conciliation Service, the Administrative Conference of the United States, or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. A hearing board shall act by majority vote.

(c) DISMISSAL OF FRIVOLOUS CLAIMS.—Prior to a hearing under subsection (d), a hearing board may dismiss any claim that it finds to be frivolous.

(d) HEARING.— A hearing shall be conducted—

(1) in closed session on the record by a hearing board;

(2) no later than 30 days after filing of the complaint under subsection (a), except that the Office may, for good cause, extend up to an additional 60 days the time for conducting a hearing; and

(3) except as specifically provided in this title and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code.

(e) DISCOVERY.—Reasonable prehearing discovery may be permitted at the discretion of the hearing board.

(f) SUBPOENA.—

(1) AUTHORIZATION.—A hearing board may authorize subpoenas, which shall be issued by the presiding hearing officer on behalf of the hearing board, for the attendance of witnesses at proceedings of the hearing board and for the production of correspondence, books, papers, documents, and other records.

(2) OBJECTIONS.—If a witness refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with the proceedings of a hearing board, the hearing board shall rule on the objection. At the request of the witness, the employee, or employing office, or on its own initiative, the hearing board may refer the objection to the Select Committee on Ethics for a ruling.

(3) ENFORCEMENT.—The Select Committee on Ethics may make to the Senate any recommendations by report or resolution, including recommendations for criminal or civil enforcement by or on behalf of the Office, which the Select

Committee on Ethics may consider appropriate with respect to—

(A) the failure or refusal of any person to appear in proceedings under this or to produce records in obedience to a subpoena or order of the hearing board; or

(B) the failure or refusal of any person to answer questions during his or her appearance as a witness in a proceeding under this section.

For purposes of section 1365 of title 28, United States Code, the Office shall be deemed to be a committee of the Senate.

(g) DECISION.—The hearing board shall issue a written decision as expeditiously as possible, but in no case more than 45 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the employee and the employing office. The decision shall state the issues raised by the complaint, describe the evidence in the record, and contain a determination as to whether a violation has occurred.

(h) REMEDIES.—If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under section 706(g) and (k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A (a) and (b)(2) of the Revised Statutes (42 U.S.C. 1981 and 1981A (a) and (b)(2)). In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)). Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

(i) PRECEDENT AND INTERPRETATIONS.—Hearing boards shall be guided by judicial decisions under statutes referred to in section 302 and subsection (h) of this section, as well as the precedents developed by the Select Committee on Ethics under section 308, and other Senate precedents.

SEC. 308. REVIEW BY THE SELECT COMMITTEE ON ETHICS.

(a) IN GENERAL.—An employee or the head of an employing office may request that the Select Committee on Ethics (referred to in this section as the "Committee"), or such other entity as the Senate may designate, review a decision under section 307, including any decision following a remand under subsection (c), by filing a request for review with the Office not later than 10 days after the receipt of the decision of a hearing board. The Office, at the discretion of the Director, on its own initiative and for good cause, may file a request for review by the Committee of a decision of a hearing board not later than 5 days after the time for the employee or employing office to file a request for review has expired. The Office shall transmit a copy of any request for review to the Committee and notify the interested parties of the filing of the request for review.

(b) REVIEW.—Review under this section shall be based on the record of the hearing board. The Committee shall adopt and publish in the Congressional Record procedures for requests for review under this section.

(c) REMAND.—Within the time for a decision under subsection (d), the Committee may remand a decision no more than one time to the hearing board for the purpose of supplementing the record or for further consideration.

(d) FINAL DECISION.—

(1) HEARING BOARD.—If no timely request for review is filed under subsection (a), the Office shall enter as a final decision, the decision of the hearing board.

(2) SELECT COMMITTEE ON ETHICS.—

(A) If the Committee does not remand under subsection (c), it shall transmit a written final decision to the Office for entry in the records of the Office. The Committee shall transmit the decision not later than 60 calendar days during which the Senate is in session after the filing of a request for review under subsection (a). The Committee may extend for 15 calendar days during which the Senate is in session the period for transmission to the Office of a final decision.

(B) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, unless a majority of the Committee votes to reverse or remand the decision of the hearing board within the time for transmission to the Office of a final decision.

(C) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, if the Committee, in its discretion, decides not to review, pursuant to a request for review under subsection (a), a decision of the hearing board, and notifies the interested parties of such decision.

(3) ENTRY OF A FINAL DECISION.—The entry of a final decision in the records of the Office shall constitute a final decision for purposes of judicial review under section 309.

(e) STATEMENT OF REASONS.—Any decision of the Committee under subsection (c) or subsection (d)(2)(A) shall contain a written statement of the reasons for the Committee's decision.

SEC. 309. JUDICIAL REVIEW.

(a) IN GENERAL.—Any Senate employee aggrieved by a final decision under section 308(d), or any Member of the Senate who would be required to reimburse the appropriate Federal account pursuant to the section entitled "Payments by the President or a Member of the Senate" and a final decision entered pursuant to section 308(d)(2)(B), may petition for review by the United States Court of Appeals for the Federal Circuit.

(b) LAW APPLICABLE.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that—

(1) with respect to section 2344 of title 28, United States Code, service of the petition shall be on the Senate Legal Counsel rather than on the Attorney General;

(2) the provisions of section 2348 of title 28, United States Code, on the authority of the Attorney General, shall not apply;

(3) the petition for review shall be filed not later than 90 days after the entry in the Office of a final decision under section 308(d);

(4) the Office shall be an "agency" as that term is used in chapter 158 of title 28, United States Code; and

(5) the Office shall be the respondent in any proceeding under this section.

(c) STANDARD OF REVIEW.—To the extent necessary to decision and when presented, the court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final decision if it is determined that the decision was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. The record on review shall include the record before the hearing board, the decision of the hearing board, and the decision, if any, of the Select Committee on Ethics.

(d) ATTORNEY'S FEES.—If an employee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C.2000e-5k)).

SEC. 310. RESOLUTION OF COMPLAINT.

If, after a formal complaint is filed under section 307, the employee and the head of the employing office resolve the issues involved, the employee may dismiss the complaint or the parties may enter into a written agreement, subject to the approval of the Director.

SEC. 311. COSTS OF ATTENDING HEARINGS.

Subject to the approval of the Director, an employee with respect to whom a hearing is held under this title may be reimbursed for actual and reasonable costs of attending proceedings under sections 307 and 308, consistent with Senate travel regulations. Senate Resolution 259, agreed to August 5, 1987 (100th Congress, 1st Session), shall apply to witnesses appearing in proceedings before a hearing board.

SEC. 312. PROHIBITION OF INTIMIDATION.

Any intimidation of, or reprisal against, any employee by any Member, officer, or employee of the Senate, or by the Architect of the Capitol, or anyone employed by the Architect of the Capitol, as the case may be, because of the exercise of a right under this title constitutes an unlawful employment practice, which may be remedied in the same manner under this title as is a violation.

SEC. 313. CONFIDENTIALITY.

(a) COUNSELING.—All counseling shall be strictly confidential except that the Office and the employee may agree to notify the head of the employing office of the allegations.

(b) MEDIATION.—All mediation shall be strictly confidential.

(c) HEARINGS.—Except as provided in subsection (d), the hearings, deliberations, and decisions of the hearing board and the Select Committee on Ethics shall be confidential.

(d) FINAL DECISION OF SELECT COMMITTEE ON ETHICS.—The final decision of the Select Committee on Ethics under section 308 shall be made public if the decision is in favor of the complaining Senate employee or if the decision reverses a decision of the hearing board which had been in favor of the employee. The Select Committee on Ethics may decide to release any other decision at its discretion. In the absence of a proceeding under section 308, a decision of the hearing board that is favorable to the employee shall be made public.

(e) RELEASE OF RECORDS FOR JUDICIAL REVIEW.—The records and decisions of hearing boards, and the decisions of the Select Committee on Ethics, may be made public if required for the purpose of judicial review under section 309.

SEC. 314. EXERCISE OF RULEMAKING POWER.

The provisions of this title, except for sections 309, 320, 321, and 322, are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate. Notwithstanding any other provision of law, except as provided in section 309, enforcement and adjudication with respect to the discriminatory practices prohibited by section 302, and arising out of Senate employment, shall be within the exclusive jurisdiction of the United States Senate.

SEC. 315. TECHNICAL AND CONFORMING AMENDMENTS.

Section 509 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12209) is amended—

(1) in subsection (a)—

(A) by striking paragraphs (2) through (5);

(B) by redesignating paragraphs (6) and (7) as paragraphs (2) and (3), respectively; and

(C) in paragraph (3), as redesignated by subparagraph (B) of this paragraph—

(i) by striking "(2) and (6)(A)" and inserting "(2)(A)", as redesignated by subparagraph (B) of this paragraph; and

(ii) by striking "(3), (4), (5), (6)(B), and (6)(C)" and inserting "(2)"; and

(2) in subsection (c)(2), by inserting ", except for the employees who are defined as Senate employees, in section 301(c)(1) of the Civil Rights Act of 1991" after "shall apply exclusively".

SEC. 316. POLITICAL AFFILIATION AND PLACE OF RESIDENCE.

(a) IN GENERAL.—It shall not be a violation with respect to an employee described in subsection (b) to consider the—

(1) party affiliation;

(2) domicile; or

(3) political compatibility with the employing office, of such an employee with respect to employment decisions.

(b) DEFINITION.—For purposes of this section, the term "employee" means—

(1) an employee on the staff of the Senate leadership;

(2) an employee on the staff of a committee or subcommittee;

(3) an employee on the staff of a Member of the Senate;

(4) an officer or employee of the Senate elected by the Senate or appointed by a Member, other than those described in paragraphs (1) through (3); or

(5) an applicant for a position that is to be occupied by an individual described in paragraphs (1) through (4).

SEC. 317. OTHER REVIEW.

No Senate employee may commence a judicial proceeding to redress discriminatory practices prohibited under section 302 of this title, except as provided in this title.

SEC. 318. OTHER INSTRUMENTALITIES OF THE CONGRESS.

It is the sense of the Senate that legislation should be enacted to provide the same or comparable rights and remedies as are provided under this title to employees of instrumentalities of the Congress not provided with such rights and remedies.

SEC. 319. RULE XLII OF THE STANDING RULES OF THE SENATE.

(a) REAFFIRMATION.—The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate, which provides as follows:

"No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

"(a) fail or refuse to hire an individual;

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment

on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.".

(b) AUTHORITY TO DISCIPLINE.—Notwithstanding any provision of this title, including any provision authorizing orders for remedies to Senate employees to redress employment discrimination, the Select Committee on Ethics shall retain full power, in accordance with its authority under Senate Resolution 338, 88th Congress, as amended, with respect to disciplinary action against a Member, officer, or employee of the Senate for a violation of Rule XLII.

SEC. 320. COVERAGE OF PRESIDENTIAL APPOINTEES.

(a) IN GENERAL.—

(1) APPLICATION.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of Presidential appointees.

(2) ENFORCEMENT BY ADMINISTRATIVE ACTION.—Any Presidential appointee may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, or such other entity as is designated by the President by Executive Order, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall

determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission, or such other entity as is designated by the President pursuant to this section, determines that a violation has occurred, the final order shall also provide for appropriate relief.

(3) JUDICIAL REVIEW.—

(A) IN GENERAL.—Any party aggrieved by a final order under paragraph (2) may petition for review by the United States Court of Appeals for the Federal Circuit.

(B) LAW APPLICABLE.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that the Equal Employment Opportunity Commission or such other entity as the President may designate under paragraph (2) shall be an "agency" as that term is used in chapter 158 of title 28, United States Code.

(C) STANDARD OF REVIEW.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under paragraph (2) if it is determined that the order was—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(ii) not made consistent with required procedures; or

(iii) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(D) ATTORNEY'S FEES.—If the presidential appointee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(b) PREISDENTIAL APPOINTEE.—For purposes of this section, the term "Presidential appointee" means any officer or employee, or an applicant seeking to become an officer or

employee, in any unit of the Executive Branch, including the Executive Office of the President, whether appointed by the President or by any other appointing authority in the Executive Branch, who is not already entitled to bring an action under any of the statutes referred to in section 302 but does not include any individual—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) who is appointed to an advisory committee, as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.); or

(3) who is a member of the uniformed services.

SEC. 321. COVERAGE OF PREVIOUSLY EXEMPT STATE EMPLOYEES.

(a) APPLICATION.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) ENFORCEMENT BY ADMINISTRATIVE ACTION.—

(1) IN GENERAL.—Any individual referred to in subsection (a) may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) REFERRAL TO STATE AND LOCAL AUTHORITIES.—

(A) APPLICATION.—Section 706(d) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5d)) shall apply with respect to any proceeding under this section.

(B) DEFINITION.—For purposes of the application described in subparagraph (A), the term "any charge filed by a member of the Commission alleging an unlawful employment practice" means a complaint filed under this section.

(c) JUDICIAL REVIEW.—Any party aggrieved by a final order under subsection (b) may obtain a review of such order under chapter 158 of title 28, United States Code. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of title 28, United States Code.

(d) STANDARD OF REVIEW.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) if it is determined that the order was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) ATTORNEY'S FEES.—If the individual referred to in subsection (a) is the prevailing party in a proceeding under this subjection, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C.2000e-5k)).

SEC. 322. SEVERABILITY.

Notwithstanding section 401 of this Act, if any provision of section 309 or 320(a)(3) is invalidated, both sections 309 and 320(a)(3) shall have no force and effect.

SEC. 323. PAYMENTS BY THE PRESIDENT OR A MEMBER OF THE SENATE.

The President or a Member of the Senate shall reimburse the appropriate Federal account for any payment made on his or her behalf out of such account for a violation committed under the provisions of this title by the President or Member of the Senate not later than 60 days after the payment is made.

SEC. 324. REPORTS OF SENATE COMMITTEES.

(a) Each report accompanying a bill or joint resolution of a public character reported by any committee of the Senate (except the Committee on Appropriations and the Committee on the Budget) shall contain a listing of the provisions of the bill or joint resolution that apply to Congress and an evaluation of the impact of such provisions on Congress.

(b) The provisions of this section are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

SEC. 325. INTERVENTION AND EXPEDITED REVIEW OF CERTAIN APPEALS.

(a) INTERVENTION.—Because of the constitutional issues that may be raised by section 309 and section 320, any Member of the Senate may intervene as a matter of right in any proceeding under section 309 for the sole purpose of determining the constitutionality of such section.

(b) THRESHOLD MATTER.—In any proceeding under section 309 or section 320, the United States Court of Appeals for the Federal Circuit shall determine any issue presented concerning the constitutionality of such section as a threshold matter.

(c) APPEAL.—

(1) IN GENERAL.—An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by the

United States Court of Appeals for the Federal Circuit ruling upon the constitutionality of section 309 or 320.

(2) JURISDICTION.—The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in paragraph (1), advance the appeal on the docket and expedite the appeal to the greatest extent possible.

TITLE IV—GENERAL PROVISIONS

SEC. 401. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

SEC. 402. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

TITLE V—CIVIL WAR SITES ADVISORY COMMISSION

SEC. 501. CIVIL WAR SITES ADVISORY COMMISSION.

Section 1205 of Public Law 101-628 is amended in subsection (a) by—

(1) striking "Three" in paragraph (4) and inserting "Four" in lieu thereof; and

(2) striking "Three" in paragraph (5) and inserting "Four" in lieu thereof.

Approved November 21, 1991.